Decisions

# of the

United States Merit Systems Protection Board

Volume 4

October 10, 1980—December 31, 1980

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United States Merit Systems Protection Board

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FOREWORD

We are pleased to publish the second set of Merit Systems Protection Board decision volumes, part of the Board's ongoing program to make its opinions readily accessible and to create a permanent record for research. As an addition to Volumes 1 and 2, and their companion index volume, Volumes 3 and 4 are published as a set, and cover the period July 23 through December 31, 1980. The relevant index is published as part of each volume, rather than as a separate book.

Contents of Volumes 3 and 4 are Board final actions taken under the appellate and original jurisdiction conferred by the Civil Service Reform Act of 1978. Interlocutory actions of precedential value are also included.

Final decisions issued by presiding officials on the Board's behalf in the regional offices are available for review at the central office in Washington, D.C. and at the Board's 11 regional offices. Also, the Board issues a monthly digest of Board orders and list of issuances. All Board issuances may be reviewed at the MSPB Legal Publications Division, Falls Church, Va.

ERSA H. POSTON,
Vice Chair.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT F. HUDSON
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
CH831L09016

ORDER

Appellant's disability retirement application was denied by the Office of Personnel Management (OPM), whereupon he filed an appeal with this Board under 5 U.S.C. 8347(d). The presiding official in the initial decision found that OPM's decision to disallow appellant's application for disability retirement was supported by a preponderance of the evidence.

In his petition for review, appellant alleged, for the first time, the existence of an additional medical condition based on evidence that was not available at the time the record was closed. Appellant further alleged that this new medical condition rendered him totally disabled for useful and efficient service within the meaning of 5 U.S.C. 8331(6).

The Board, having fully considered appellant's petition for review of the initial decision issued on July 10, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

Appellant's "new evidence" does not affect the correctness of the initial decision sustaining OPM's determination to reject appellant's disability retirement application. However, this new information may form the basis for appellant's filing of a new application for disability retirement pursuant to 5 U.S.C. 8337 within one year of his separation from the service.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *October 10, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN G. GARONE
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
NY831L09011

OPINION AND ORDER

The appellant petitioned for review of the initial decision of the New York Field Office which dismissed, as not within the Board's jurisdiction, his appeal from the agency's denial of his disability retirement application. The presiding official found that the appellant had not demonstrated that he had five years of civilian service, a prerequisite for eligibility for disability retirement, and thus dismissed the appeal for want of jurisdiction. In the petition for review, the appellant contended that he did not receive notice of the closing of the record, and he offered new evidence which allegedly was not available at the time the record closed.

A review of the record indicates that the presiding official made errors sufficient to require that the petition for review be granted.

The record does not contain evidence, e.g., certified mail return receipt, that the appellant ever received notice of his opportunity to submit further evidence in support of his appeal or notice that the record was closing. For this reason and because the appellant has made a plausible and unrebutted claim that the new evidence could not have been obtained prior to the record closing, the Board finds that the evidence must be accepted for consideration.

The presiding official's dismissal of this case for lack of jurisdiction is in error. The Board has appellate jurisdiction over determinations of the Office of Personnel Management (OPM) relating to retirement matters. 5 U.S.C. 8347(d); 5 C.F.R. 831.110(a); 5 C.F.R. 831.1205(a). An appellant need not establish entitlement to a retirement annuity in order to invoke the Board's jurisdiction over the determination made by OPM in his case.

Accordingly, the petition for review is GRANTED; the initial decision is VACATED; and the case is REMANDED to the presiding official for an adjudication of the merits of the case after providing an opportunity for both parties to submit evidence and argument.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 13, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BENJAMIN BELTON v. DEPARTMENT OF THE NAVY	Docket No. AT075209171

ORDER

Appellant's appeal was dismissed on April 22, 1980, for failure to prosecute. He had been removed effective December 14, 1979, from his job as a forklift operator for excessive unauthorized absence. His appeal was filed December 15, 1979.

In a petition for review and supplemental affidavit, appellant, represented by Neighborhood Legal Services, contends, among other matters, that he was prevented by circumstances beyond his control from pursuing his appeal.

He alleges that he was in a correctional institution from July 30, 1979, to February 1, 1980; that he is functionally illiterate; and that he did not receive and therefore could not respond to the Board's correspondence of January 2 and 25, 1979; and that he was unaware of the status of his appeal until he received the Initial Decision.

He further alleges that although he received the notice of proposed removal and the notice of removal, he had to pay other inmates to read them to him and had to pay an inmate to prepare the appeal form for him and that inmate misunderstood the address. The record shows that the Board's correspondence of January 2 and 25 was returned marked "Unclaimed." The record shows that all Board correspondence was sent to the incorrect address and is sufficient to explain any delay in his receiving the Initial Decision. The Board will therefore entertain the petition.

Appellant's affidavit raises sufficient questions to warrant an opportunity for him to present evidence to support his allegations. If the presiding official is satisfied that appellant could not reasonably have pursued his appeal under the circumstances, but did so as soon as possible, then the appeal should be heard on the merits of the discharge.

The petition for review is GRANTED; the Initial Decision is REMANDED for hearing in accordance with this opinion.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEROY B. CURTIS
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Docket No. DC035109081

OPINION AND ORDER

Appellant filed a petition for appeal from the action of the Equal Employment Opportunity Commission reassigning him to another position at the same grade and pay as the result of a reorganization. Appellant claimed that reduction-in-force (RIF) procedures should have been followed in effecting the reorganization. Subsequently, the agency rescinded its reorganization and appellant's reassignment. The agency submitted a motion to dismiss the appeal for mootness and appellant filed a motion to withdraw his appeal.

The presiding official issued an initial decision finding that appellant was not affected by a RIF and that he was merely reassigned from one position to another position. Finding further that the agency action had been rescinded and the parties had moved to dismiss, the presiding official dismissed the appeal for want of jurisdiction in the Board.

Appellant *pro se* timely filed a petition for review in which he asserted that the presiding official erred and exceeded her authority in finding the agency's action was proper on the basis of an incomplete record and without affording appellant a hearing as he requested. Appellant contended that the presiding official should have dismissed the appeal without making findings on the merits. The agency has not responded to appellant's petition.

The petition for review of the initial decision is GRANTED.

Where the presiding official is requested to dismiss an appeal upon motion and with the consent of the parties, and he or she determines that dismissal is appropriate, an initial decision should be issued under 5 C.F.R. 1201.111 containing findings of fact and conclusions, as well as the reasons or bases therefor, in support of the decision to dismiss. We have held that where a case appears not to be within the jurisdiction of the Board, it is more appropriate for the presiding official to dismiss on jurisdictional grounds rather than to dismiss on procedural grounds of questionable validity. *In the matter of Bohannon*, 1 MSPB 15 (1979). Similarly, the merits of an appeal dismissed by the Board on the motion of a party and with the consent of all the parties need not be addressed. *Cf. In the matter of Allen*, MSPB Docket No. OM-80-432-2 (January 11, 1980).

There is neither need nor justification for an initial decision to rule on disputed factual issues or on questionable procedural issues where an appeal is dismissed with the consent of all the parties before a hearing has been held and the parties have not been afforded a full opportunity to develop and argue their versions of the facts.

Accordingly, the initial decision dated June 2, 1980 is VACATED and REVERSED in its findings of fact on the merits of the appeal, and as MODIFIED, the initial decision is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 14, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EDWARD H. KOENIG
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
DC531D09029

OPINION AND ORDER

On June 3, 1979, the Office of Personnel Management ("OPM") withheld appellant Edward H. Koenig's within-grade increase on the basis of allegedly unsatisfactory performance. Appellant was first notified of his supervisor's intent to withhold the within-grade increase on June 1, 1979. Since appellant had not received the required 60-day notice of his supervisor's intent to deny the within-grade increase on the basis of unsatisfactory performance, appellant was entitled to a reconsideration of the denial after 60 days. Appellant's supervisor made the reconsideration and again denied the within-grade increase on August 2, 1979.

Appellant appealed each of decisions to the Board and the two appeals have been considered separately. This appeal involves the denial of the within-grade increase on August 2, 1979, after the 60-day reconsideration period. OPM's August 2, 1979 denial of the within-grade increase was affirmed on June 11, 1980. Appellant filed his petition for review on July 16, 1980.

The June 3, 1979 denial of the within-grade increase was disposed of in *Koenig v. Office of Personnel Management,* MSPB No. D.C. 531D09032, which became a final decision of this Board on August 15, 1980. OPM chose not to petition for review of the presiding official's initial decision reversing OPM's June 3, 1979 denial of the within-grade increase concluding that OPM's decision was not supported by substantial evidence.

On August 16, 1980, OPM issued two SF-50's cancelling the June 3, 1979 and August 2, 1979 denials of the within-grade increase and retroactively granting the within-grade increase effective June 3, 1979. On August 27, 1980, OPM moved to dismiss the petition for review filed in this matter as moot. Appellant has not responded to OPM's motion to dismiss even though a copy of that motion was forwarded to him by the Secretary of the Board on August 28, 1980.

Accordingly, the petition for review is granted, the initial decision dated June 11, 1980 is vacated, and the appellant's appeal is dismissed as being moot. This is the final order of the Merit Systems Protection Board in this appeal.

The appellant is informed of his right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this opinion and order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN C. LANGENBACH
v.
U.S. POSTAL SERVICE

Docket No.
NY075209142

ORDER

The Board, having fully considered the agency's petition for review of the initial decision issued on June 27, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The Board notes the Presiding Official erroneously concluded that because appellant had filed a subsequent EEO complaint, the discrimination issues in Mr. Langenbach's appeal were no longer properly before the Board. The Board in *Cardenas v. U.S. Postal Service,* 1 MSPB 560 (1980), held that a subsequent EEO complaint does not divest the Board of jurisdiction over an appeal. However it does not appear that the rights of either party were prejudiced by this error. The initial decision will therefore not be reopened.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD W. THOMAS
v.
UNITED STATES POSTAL SERVICE

Docket No.
PH075299064

OPINION AND ORDER

Pursuant to 5 U.S.C. 7701(f)(2), and 5 C.F.R. 1201.36, the Board hereby joins for decision petitioner's appeals of suspension and removal actions by the United States Postal Service, Philadelphia Bulk Mail Center, Philadelphia, Pennsylvania.

The records indicate that the initial decisions affirming the agency's removal and suspension actions pursuant to 5 U.S.C. 7513(a), were issued respectively on August 9 and 10, 1979.

The decisions informed petitioner of his right to file petitions for review to the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than September 13, 1979, in the removal action case, and September 14, 1979, in the suspension action case.

Nevertheless, petitioner's undated single petition for review of the agency's actions was received by the Office of Personnel Management on October 19, 1979.[1] It was not sent by certified mail, and the date of postmark on it is unclear. Thereupon, the petition was forwarded to the Office of the Secretary of the Board.

5 C.F.R. 1201.114(b) requires that a petition for review be filed within thirty-five days of the issuance of the initial decision.

Pursuant to 5 C.F.R. 1201.113(d), the Board may extend the thirty-five day time limit for good cause shown. Accordingly, the Board provided petitioner an opportunity to show good cause why the time limit for filing a petition for review should be extended in his case.

Upon examining the reason asserted by the petitioner for failure to file within the requisite thirty-five day time period, seeking union and legal assistance, the Board finds that the petitioner has not shown good cause for extending the time limit for filing his petition for review.[2]

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[1] Petitioner alleged in his petition for review that he was "not notified of when the hearing would be held until the decision was rendered." However, the record reveals that a hearing was neither held nor requested.

Therefore, the petition for review is dismissed because of untimeliness.

This is the final decision of the Merit Systems Protection Board in this appeal. Petitioner is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after petitioner's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 14, 1980*

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[2] We note that petitioner did not attempt to excuse his untimeliness by citing the non-receipt of the decision on the suspension action. In light of the timely receipt of the removal decision (received August 10, as demonstrated by his signature on the certified mail receipt) and the notice in the record that petitioner was given a copy of the suspension decision on his September 4, 1979 visit to the field office, we conclude that such an argument would not have been sufficient to affect our decision.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROSA WHITE v. DEPARTMENT OF THE TREASURY	Docket No. SF075299026

OPINION AND ORDER

Appellant is an employee in the competitive service who has completed her probationary period. Her position was changed by the Department of the Treasury, Internal Revenue Service, Los Angeles, California from Tax Examiner (Foreign Language) (Revenue Representative), GS-4/2, to Clerk-Typist, GS-3/6 effective February 11, 1979.

At issue before the Board's presiding official was whether such change resulting in a reduction of appellant's grade was an action over which the Board has jurisdiction. Simply put, if the agency action was based upon appellant's voluntary request, the Board has no jurisdiction to consider the agency action. 5 C.F.R. 752.401(a); 1201.3(a). If, however, the agency action did not arise as a result of "voluntary action initiated by the employee," 5 C.F.R. 752.401(c)(3), such action constitutes an adverse action by the agency which is reviewable by the Board.

In his initial decision, the Board's presiding official determined that the change undertaken by the agency was the result of appellant's voluntary request and thus that the Merit Systems Protection Board is without jurisdiction to consider the action.

Appellant, in her petition for review, alleges, *inter alia,* that time constraints placed upon her by the agency acted in such a way so that she was not given the benefit of a free and informed choice regarding her change in positions, and that she was not fully aware of the options available to her in making such a choice. The unique factual circumstances surrounding her change from one position to another lead us to agree with her contention.

On December 17, 1978, appellant was promoted from the position of Clerk-Typist to the position of Tax Examiner. Shortly thereafter, appellant entered a training program associated with her new position which was to run from January 2, 1979 through January 26, 1979. Several days prior to the conclusion of the course, appellant notified agency personnel that she was experiencing some difficulty with a portion of her training. On January 26, appellant met with two agency instructors and her second line supervisor for approximately thirty minutes to discuss appellant's difficulties.

The events which took place at the January 26 meeting were in dispute at hearing, with appellant testifying that she felt forced to sign a handwritten statement requesting reassignment to her former position, while agency representatives testified that the signing of such statement reflected appellant's difficulties with the training program and her desire to be placed in one of three West Los Angeles duty stations. It appears, however, that both appellant and her second line supervisor believed at the close of the January 26 meeting that the clerical position appellant agreed to accept would be at the GS-4 level. Appellant was told to report to her duty station on Monday, January 29, 1979.

On January 30, 1979, appellant, having been absent on sick leave the day before, reported as directed to her new duty station. Following the January 26 meeting, appellant's second line supervisor had determined both that appellant's original clerical position had been as a GS-3, and that there were no GS-4 clerical positions vacant in the geographical area desired by appellant. Thus on January 30, appellant was asked to meet with supervisory staff and informed in a twenty minute session that she would have to take a downgrade in order to assume the clerical position in the geographical area she desired. After being escorted to her new office space, she was presented with the following statement:

> I would like to be re-assigned (sic) from a revenue representative in the Culver City office group to a GS-3 Clerk-Typist in Culver City office group collection division.

Appellant's second line supervisor, who only the Friday before had arranged for the change in positions, stood waiting, leaning on appellant's desk, while appellant read and signed the statement. The entire transaction, including the supervisory meeting, the movement from one office to the other, the preparation of the statement, and its signature by appellant consumed less than ninety minutes.

While the events of the January 30 meeting, like those of the earlier meeting on January 26, were susceptible of various interpretations by those actually in attendance, certain facts are clear from the record and enter into our determination:

1. Appellant was given an extremely brief period of time to consider the acceptance of a reduction in grade,
2. At the time she was called upon to make such a consideration, her options had been reduced significantly by her earlier signed statement,
3. Appellant's strong desire to keep a position in a limited geographical area was known to her supervisors and was a

limitation on her actions as well as those of her supervisors, and

4. Appellant was presented with no viable alternatives.

Duress has been shown to exist in the circumstances leading to appellant's "request" for "re-assignment" and demotion. In reviewing the circumstances of this appeal to determine whether the request for reduction was voluntary or involuntary, we consider the standards established by the courts. In *McGucken v. United States*, 407 F.2d 1349 (Ct.Cl.), *cert. den.* 396 U.S. 894 (1969), the court dealt with the question of voluntariness as related to the validity of a proffered resignation. Holding that the involuntary nature of a resignation arises from external coercion and duress, the court announced its standard of determining voluntariness as being the absence of duress. It then recited the following as a definition of that standard:

> "* * * three elements are common to all situations where duress has been found to exist. These are: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. * * * *Fruhauf Southwest Garment Company v. United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953)."

When the court-enunciated tests are applied to the facts in this case, we conclude that the reduction in grade was involuntary.

The Board has reviewed the record on its own motion under the authority provided in 5 U.S.C. 7701(e)(1)(B), and finds that the reduction in grade in the instant case was involuntarily obtained.

The involuntary reduction in grade is an adverse action under 5 U.S.C. 7512, and the appellant was entitled to the procedures provided in 5 U.S.C. 7513. These procedures not having been afforded appellant, there is no difficulty in finding this omission a harmful error.

ACCORDINGLY, IT IS ORDERED that the initial decision of the presiding official, No. SF075299026, issued June 12, 1979, finding that the request for reassignment from revenue representative to clerk-typist was voluntary, is hereby REVERSED, and the agency is directed to cancel the action.

This is the final decision of the Merit Systems Protection Board in this case. The agency is hereby ORDERED to furnish evidence of compliance with this Order to the Field Office within ten (10) days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 15, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES M. LARSON
v.
UNITED STATES POSTAL SERVICE

Docket No.
CH075209033

OPINION AND ORDER

Appellant was removed from his position as a City Carrier with the U.S. Postal Service, St. Paul, Minnesota, for drinking while in uniform and on duty and for deviation from his assigned route, effective August 31, 1979. His past disciplinary record of six separate suspensions was also given consideration by the agency in determining the discipline to impose for the present charges. He filed an appeal from this action with the Board's Chicago Field Office alleging that he had not been drinking as charged and that the deviation from his route did not warrant removal. The presiding official found that the preponderance of evidence supported the agency's charges and that the removal was for such cause as would promote the efficiency of the service.

Appellant in his petition for review has challenged (1) the presiding official's finding that he was drinking on duty and (2) the "last chance" settlement of a grievance he had filed on a previous disciplinary action. He has again claimed that there was discrimination due to his alcoholism and that his deviation from the assigned route did not warrant removal.

In *Weaver v. Department of the Navy*, 2 MSPB 297 (1980), the Board decided that a review of the presiding official's fact finding will only be undertaken when the petition explains why the challenged factual determination is incorrect and identifies specific evidence in the record which demonstrates the error. Appellant in this case has merely alleged that the finding on his drinking was wrong. He has neither explained why the determination was incorrect nor identified anything in the record which demonstrates the error. Under the circumstances, the Board finds that this contention does not present a basis for review.

Appellant's challenge of the "last chance" settlement was based on his own allegation that he was forced into agreeing to it. The settlement arose out of a proposed removal action in 1978 for absence without leave, which was reduced to a 20-day suspension on the condition that appellant join the Postal Service's Program for Alcoholic Recovery (PAR). In part, the settlement stated:

> It is agreed by all parties that this is a last chance settlement. Any further violation of Postal Service rules and regulations will result in removal from the Postal Service.

Appellant now asserts that the Postal Service did not offer him help, but punished him for his disease. The facts, however, established that he did enter PAR and was given an opportunity for rehabilitation. He has offered no evidence of coercion regarding the settlement. Accordingly, the Board finds no reason to reopen the record on the basis of this assertion.

The Board does not agree that the agency punished or discriminated against appellant because of his alcoholism. The agency made reasonable accommodation for him after several infractions of agency regulations which were probably due to his alcoholism. Appellant in essence has requested another opportunity. We do not find that appellant is entitled to such an opportunity given the facts and the terms of the settlement. Moreover, we note that the presiding official did not base his determination of the propriety of the penalty imposed on the fact of the settlement. Rather, as the initial decision shows, he considered "the facts and circumstances of [t]his case" as well as "the cited elements of the appellant's past disciplinary record" and concluded that removal was proper.

As for the final contention regarding the harshness of the penalty for the route deviation, the removal action was for two charges—drinking on duty and deviation from route, both of which were sustained. To try to determine the appropriate penalty for route deviation alone would be to engage in speculation, and it is not required in this case. Thus, the contention does not establish a basis for review.

The Board, having fully considered appellant's petition for review and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 15, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

VELA I. MCBRIDE
v.
DEPARTMENT OF AGRICULTURE

Docket No.
SF043209006

OPINION AND ORDER

The Department of Agriculture (the agency) and the Office of Personnel Management (OPM) have petitioned for review of the award of attorney fees to Vela I. McBride (the appellant) by the San Francisco Field Office of the Merit Systems Protection Board. We have given full consideration to the arguments of the agency and OPM and the counterarguments of the appellant.

The presiding official reversed the agency's dismissal of the appellant from the position of Accounts Maintenance Clerk, GS-5, for unacceptable performance, concluding that the agency did not meet its burden of proving its charges.[1] He then granted the appellant's motion for an award of attorney fees under 5 U.S.C. 7701 (g) (1) on the basis that the appellant was the "prevailing party" and "(t) he agency has nowhere asserted that payment of reasonable attorney fees in this case would not be in the interests of justice." Addendum Decision at 1. In granting the motion, however, the presiding official excluded 15 hours of services claimed by the appellant's attorney for contesting the action before the agency issued its final decision, finding that the Board has no jurisdiction to award fees for such services. A total of $1,470.00 was awarded.

Without question, the presiding official's order awarding attorney fees is erroneous in that it lacks any analysis of the statutory and regulatory requirements for such an award, other than the "prevailing party" determination. 5 U.S.C. 7701(g) (1) ; 5 C.F.R. 1201.37 (a). *See Allen v. U.S. Postal Service*, 2 MSPB 582 (1980) ; *O'Donnell v. Department of the Interior*, 2 MSPB 604 (1980) ; *Kling v. Department of Justice*, 2 MSPB 620 (1980). All of those requirements must be met regardless of any position taken by the agency.

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[1] The agency did not petition for review of the initial decision, issued prior to our decision in *Wells v. Harris*, 1 MSPB 199 (1979). It is, therefore, unnecessary for us to consider whether the standards applicable under 5 U.S.C. 4303 properly governed the case. We note, however, that on the facts found by the presiding official, the action clearly could not have been sustained under the more rigorous standards of chapter 75, title 5.

We find, nonetheless, that an award of reasonable attorney fees is warranted in the interest of justice in this appeal because the presiding official's initial decision indicates that the appellant proved by the preponderance of the evidence that she was substantially innocent of the charges leveled by the agency. *Allen*, 593 n. 35. The two charges related to the high incidence of error in the job orders and transfer/adjustment vouchers prepared by the appellant. She refuted both charges by showing that she had prepared more orders and vouchers than the agency noted in its charges, and that some of the errors charged were in fact not errors. The result was that the appellant's error rate was less than 5%, the maximum allowed by a critical element of her Accounts Maintenance Clerk position.

We also find, contrary to the presiding official's determination in the addendum decision, that the Board has jurisdiction to award attorney fees for services rendered to the appellant prior to issuance of the agency's final decision. If this were not so, the Board would lack the power to provide full recompense for attorney fees incurred as intended by Congress in enacting 5 U.S.C. 7701(g). *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 60-61 (1978). The only prerequisites to such an award are that the Board have jurisdiction over the appeal, 5 U.S.C. 7701, and that the services were rendered in connection with the appealable agency action. *See Kling*, 627-28. Both prerequisites are satisfied in this case.

Finally, with respect to the reasonableness of the fees claimed by the attorney who represented the appellant in these proceedings, we note that the attorney's sworn statement ascribes reasonable amounts of time to eight different work categories, all of which are compensable because of their close relationship to furthering the appellant's case. The total of 36 hours expended is not excessive, especially considering the detail of the evidentiary submissions that were developed for the hearing before the presiding official. The attorney's sworn statement also indicates that his normal billing rate is $70.00 per hour, which he believes is at or below the average rate charged by attorneys in his locality. This rate was not specifically challenged by the agency. *See Kling*, 624 n. 5. It appears reasonable in light of the attorney's representations and the fact that his defense of the appellant was very well prepared and presented. We find, therefore, that $2,520.00 is a reasonable attorney fee to be awarded in this appeal. *See Copeland v. Marshall*, No. 74-1822, slip op. at 19-26 (D.C.Cir. September 2, 1980); *Kling*, 624-28.

Accordingly, we hereby GRANT the petitions for review of the award of attorney fees in the addendum decision dated March 11, 1980, VACATE that decision, and ORDER that the agency remit a total of $2,520.00 in attorney fees to the appellant's attorney, Werner L. Ahrbeck, and furnish the Board's San Francisco Field Office with a certified statement that such payment has been made within ten (10) calendar days of receipt of this decision.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this Order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 16, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOHN H. BRADLEY v. DEFENSE COMMUNICATIONS AGENCY	Docket No. DC0752B80323

OPINION AND ORDER

On August 9, 1978, the Washington, D.C. Field Office, Federal Employees Appeals Authority (now the Washington, D.C. Field Office of the Merit Systems Protection Board), issued an appellate decision which affirmed the action of the Defense Communications Agency in removing the above-named appellant from employment, effective July 1, 1977. The decision notified appellant of the regulatory provisions for requesting reopening and reconsideration thereof and stated that any request should be submitted within a reasonable time after receipt of the decision.

On November 29, 1979, appellant filed a petition requesting reopening and reconsideration of the Field Office decision, and was afforded an opportunity to provide reasons for the delay in submitting his petition. Having considered appellant's explanation, the Board finds that the reasons offered fail to demonstrate the exercise of due diligence or show sufficient explanation for the delay in pursuing the reopening request. Although the request was based on the submission of alleged new and material evidence that was not available at the time the Field Office decision was issued, appellant has offered no explanation for the lapse of approximately five months between the time the evidence came to his personal attention and the date on which his petition was filed. Accordingly, the Board declines to accept appellant's request for reopening of the August 9, 1978 Field Office decision, because it was not timely filed.

Notwithstanding the foregoing, the Board has decided to reopen this case on its own motion pursuant to 5 C.F.R. 772.312 (1978). The record shows that appellant was removed on charges of inefficiency in performing his assigned duties, resisting competent authority, and making false and misleading statements. The third charge was based on two specifications: One involving a memorandum which appellant sent to his immediate supervisor, with copies to three other supervisors in the chain of command; the other involving a letter which appellant wrote to the Director of his agency. Both communications were critical of the agency's handling of reliability problems associated with its development of a defense computer network. The Field Office dismissed this charge and specifications, on the ground that the communications were constitutionally protected by the First Amendment, but did not articulate a rationale or cite any legal authorities to support its conclusion. The Field Office nevertheless affirmed the removal action on the ground that the evidence supported the remaining charges.

Since the issuance of the Field Office decision, the Supreme Court decided *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), which appears to support the Field Office conclusion that the communications cited in the third charge were constitutionally protected. The Court also noted that under its holding in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), the employer was entitled to defend the dismissal on the ground that it would have discharged the employee even in the absence of the protected conduct.

Since the charges, on their face, show a "mixed motivation" for appellant's removal, one of which involved constitutionally protected conduct, it is clear that the Field Office should have developed the record and analyzed the evidence in light of *Mt. Healthy*, and other relevant case law. Moreover, when viewed in light of appellant's proffered new evidence, the Board finds merit in the contention asserted in his reopening request that he was unduly restricted at the hearing in the development of the evidence supporting his claim of reprisal.

Accordingly, so that these significant issues may be considered, the Field Office decision is VACATED and the case is assigned to Administrative Law Judge John P. McCarthy, for further hearing and a new adjudication.

For the Board:

RUTH T. PROKOP,
Chairwoman.

Washington, D.C., *October 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JACK V. COWAN
v.
DEPARTMENT OF THE TREASURY

Docket No.
M-80-16(IN)

OPINION AND ORDER

This case comes before the Board on certification of an interlocutory appeal filed by the agency pursuant to 5 C.F.R. 1201.91 through 1201.93. Appellant was removed effective March 10, 1980, as a Criminal Investigator, GS-1811-12, on charges of alleged misconduct. Appellant filed a petition for appeal and designated a national field representative of his union, the National Treasury Employees Union (NTEU), as his representative. Pursuant to 5 C.F.R. 1201.31(b), the agency moved to disqualify appellant's NTEU representative on the grounds of alleged conflict of interest or position. Appellant's representative opposed the motion and on June 3, 1980, the presiding official issued an order denying the agency's motion.

The agency moved under 5 C.F.R. 1201.93 for certification of the issue by interlocutory appeal to the Board and further moved to stay the hearing pending resolution by the Board of the issue of alleged conflict of interest or position. Appellant's representative informed the presiding official that he would not oppose the agency's motion. The presiding official granted the agency's motion for certification and for a stay of the proceeding by order dated July 1, 1980.

The agency argued in its motion for certification that NTEU's representation of appellant created a conflict of position as appellant in his capacity as a special agent could be called upon to investigate and testify for the agency in an adverse action or a criminal proceeding against other agency employees who are represented by NTEU. Further, the agency asserted that Executive Order No. 12171, 44 Fed. Reg. GG565 (1979) excluded the Criminal Investigation Division of the Internal Revenue Service (IRS), in which appellant was employed, from the labor-management relations provisions of 5 U.S.C. Chapter 71 so that NTEU's representation of appellant was not permitted.

These same arguments were addressed and decided by this Board in *Sweeney v. Department of the Treasury*, 3 MSPB

321 (1980), where we determined that a conflict of interest or position which conceivably might result when the NTEU represents a criminal investigator of the IRS in an adverse action proceeding before the Board was too speculative to justify disqualification of the union under 5 C.F.R. 1201.31(b), and that a criminal investigator's exclusion from bargaining units by the Executive Order was irrelevant to whether a conflict of interest or position exists which would prevent the NTEU from representing criminal investigators before the Board. *See also Price v. Department of the Treasury,* 3 MSPB 314 (1980). We conclude that the agency has not presented convincing evidence to satisfy its burden of demonstrating there is a reasonable likelihood that, as a result of being represented by the NTEU, appellant would be compromised in the performance of his duties. *Sweeney, supra,* 324.

Accordingly, the order of the presiding official denying the agency's motion to disqualify appellant's representative is AFFIRMED and the case is REMANDED to the Field Office for adjudication on the merits.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

William Woodcock v. **Social Security Administration**	Docket No. PH531D09023

Amended Order

The Board on its own motion has reviewed its Order of October 7, 1980, in this proceeding.

The Board finds that, contrary to the statement in its October 7, 1980 Order, the record shows that upon being advised that his petition for review appeared to have been filed out of time, appellant submitted a copy of a receipt for certified mail showing that his petition for review was timely. The Board's Order of October 7, 1980, is therefore AMENDED by deleting all references to untimeliness as a basis for the Board's order.

The Board still finds, as it did in the October 7, 1980 Order, that the petition for review failed to meet the criteria of 5 C.F.R. 1201.115 and therefore hereby AFFIRMS its dismissal of the petition for review.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

Kathy W. Semone
for Robert E. Taylor,
Secretary.

Washington, D.C., *October 17, 1980*

See Board Order of October 7, 3 MSPB 518 (1980).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SAMUEL L. BROWN
v.
CIVIL AERONAUTICS BOARD

Docket No.
DC035199002

OPINION AND ORDER

The agency downgraded the appellant by a reduction-in-force procedure. On April 6, 1979, the appellant filed an appeal to the Board's Washington, D.C. Field Office and on April 20, 1979, he filed a formal complaint of discrimination within the agency.

The presiding official dismissed the appellant's appeal for lack of jurisdiction according to 5 C.F.R. 1201.154 because the appellant had contacted an Equal Employment Opportunity (EEO) Counselor prior to filing his appeal with the field office.

In a recent case, the Board held that informal contacts with an EEO Counselor made prior to the filing of a complaint do not serve to delay the Board's jurisdiction. *Christo v. U.S. Postal Service,* 3 MSPB 145 (1980). Therefore the presiding official erred in dismissing the appellant's appeal.

Accordingly, the petition for review is GRANTED, the initial decision of the presiding official is VACATED and the case is REMANDED to the field office for the issuance of a decision based upon the merits of the case.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
JERRY L. CAHILL
v.
DEPARTMENT OF AGRICULTURE

Docket No.
DE075209023

OPINION AND ORDER

Jerry L. Cahill filed a Petition under 5 C.F.R. Sec. 1201.115 (1979) seeking Board review of the initial decision issued on December 26, 1979, which dismissed his appeal for lack of jurisdiction.

Appellant was notified that he would be reassigned from Assistant County Supervisor, Department of Agriculture, Farmers Home Administration, at Sturgis, South Dakota, to County Supervisor at Martin, South Dakota, effective August 12, 1979. Appellant requested and received an informal hearing on his transfer grievance with the State Director at Huron, South Dakota, on August 14. When appellant attempted to report to work the next day at Sturgis, he was asked to leave. He was given no explanation nor was he allowed to contact the state office for clarification. Appellant later discovered he had been placed on Leave Without Pay (LWOP) as of 1:00 P.M., August 14.[1] On August 15, appellant resigned under protest. The agency accepted his resignation upon receipt August 16, but notified appellant that it had erred in placing him on LWOP and that he was to be considered Absent Without Leave (AWOL). Appellant then attempted to withdraw his resignation but the agency refused to allow the withdrawal maintaining that the resignation had already become effective.

Appellant *pro se* appealed to the Board and the presiding official found from the record that appellant's resignation was voluntary and that, therefore, the Board lacked jurisdiction. Accordingly, the presiding official issued an initial decision dismissing appellant's appeal for lack of jurisdiction. Appellant then filed a Petition for Review.

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[1] The agency notified appellant by letter dated August 14 that he had been placed on LWOP and that he would continue in that status until his grievance was settled. (*See* Exh. F). In another letter of the same date, the agency explained the procedures to follow in order to file a formal grievance. Since appellant had seven (7) days to file a formal grievance which would be decided by the Administrator in Washington, D.C., we infer that he would have been without pay for at least fourteen (14) days. (*See* Exh. D).

5 U.S.C. Sec. 7701(a)(1) provides that an appellant has a right to a hearing on an action appealable to the Board. 5 U.S.C. Sec. 7513(d) provides that a non-probationary competitive service employee, such as appellant, can appeal a "removal," as set forth at 5 U.S.C. Sec. 7512(1). Since an involuntary resignation is tantamount to removal, a non-frivolous allegation of the involuntariness of a resignation warrants a hearing on that issue. *Spiegel v. Department of the Army*, 2 MSPB 307 (1980); *Myslik v. Veterans Administration*, 2 MSPB 241 (1980); *Ragland v. Internal Revenue Service*, 2 MSPB 167 (1980); *Murray v. Defense Mapping Agency*, 1 MSPB 338 (1980). *Bell v. Groak*, 371 F.2d 202, 204 (7th Cir. 1966); *Goodman v. United States*, 358 F.2d 532, 533 (D.C. Cir. 1966); *Dabney v. Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965); *See Paroczay v. Hodges*, 219 F. Supp. 89, 93-94 (D.D.C. 1963).

The issue before the presiding official was whether a non-frivolous allegation of involuntariness had been raised. Appellant had alleged that he was placed on LWOP while on official travel status and that such action was taken without any notice to him. He maintains that he was forced to resign "since he couldn't report at Martin and he was not allowed to report to Sturgis." After he resigned, the agency changed his status to AWOL but then refused to allow him to withdraw his resignation contending that it had already become effective. Appellant's version of the facts raises issues of possible abuse of agency procedures and discretion. Certainly, appellant has raised fact issues which cannot be labeled frivolous.

Considering the issues and the fact that appellant requested a hearing, it was erroneous for the presiding official to decide the issue of voluntariness without affording petitioner a hearing on that issue.

ORDER

The Petition for Review is GRANTED. The decision of the presiding official is hereby REVERSED and the case REMANDED for the purpose of affording appellant a hearing on the issue of the voluntariness of his resignation.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RICHARD GONZALEZ
v.
U.S. DEPARTMENT OF JUSTICE

Docket No.
DA075209117

OPINION AND ORDER

Richard Gonzalez, appellant, was removed from his position as Correctional Officer, GS-5, for unsatisfactory performance and unexcused absences. He appealed the agency's action, but the presiding official sustained the discharge. A petition for review of the initial decision was subsequently filed by appellant's representative.

In the petition for review, appellant asserts he was rated as marginally satisfactory in the supervisor's evaluation of his performance dated June 7, 1979, and that this is not proof of unsatisfactory performance as charged. This argument goes to the sufficiency of the evidence, and our review of the record discloses serious questions in this regard. Accordingly, the petition for review will be GRANTED.

The term "unacceptable performance," is defined in 5 U.S.C. 4301(3) as a failure to meet established performance standards in one or more critical elements of the job. However, the agency action in this case was not based on a performance appraisal system established under 5 U.S.C. 4302. In *Wells v. Harris*, 1 MSPB 199 (1979), we said that an agency could remove employees for performance-based reasons under the procedures of 5 U.S.C. Chapter 75, but that such an action must meet the higher standard of proof applicable to that chapter—preponderance of the evidence.

The agency's evidence of appellant's unacceptable performance consisted of a number of evaluations and comments made by various supervisors. Appellant was never rated unsatisfactory in any evaluation completed before the Chief Correctional Supervisor recommended his termination. Appellant's ratings were usually "marginal satisfactory," defined on the form as barely satisfactory.

The only unsatisfactory rating of record is for the period July 1, 1979, to July 31, 1979. Although the unsatisfactory box is checked, a second box, titled "Improvement Needed," is also checked. Further, under the specific categories on the form, appellant was not marked as unsatisfactory in any category. The most comprehensive evaluation done on appellant was for the period December 1978 to June 1979. The overall rating was "marginal satisfactory." There was no category, out of the forty on the form, in which appellant was rated as inadequate.

Although appellant was not rated unsatisfactory or inadequate in any category on six different evaluations performed in a nine-month period, the agency charged that appellant's inefficiency and lack of initiative constituted a "serious threat to the effective operation of this institution." Beyond the comments made on the performance evaluation forms, there was no evidence of inefficiency or lack of initiative which constituted a serious threat to the institution. There was no specific act of misfeasance, malfeasance, or nonfeasance committed by appellant in relation to his assigned duties.

In the final analysis then, the agency relies on evaluation forms in which appellant was rated satisfactory, although marginally so, to prove its charge of unsatisfactory performance. We find that the presiding official erred when he concluded that the agency had met the statutory burden of proof, and we reverse his findings in this regard.

The second charge against appellant, unexcused absences, consisted of two specifics. The first was that appellant was ten minutes late on June 23, 1979, at which time has was charged with 15 minutes absence without leave (AWOL). The second was a charge of six hours AWOL on July 7, 1979. Based on these two specifics, it was said in the proposal letter that appellant's "lack of dependability in reporting to work on time and your lack of judgment create a serious threat to the security of this facility . . . [and] your actions in this matter have destroyed your credibility as a correctional work. . . ."

There was no evidence, beyond the evidence of the specific absences alleged, to support the conclusions stated above. As to the 15-minute AWOL charge, appellant admitted that he was late as charged. As appellant noted, however, his punctuality had been the one area in which he had been rated exceptional for the period December 8, 1978, to June 1979.

The charge of six hours AWOL on July 7, 1979, was supported by the evidence. Appellant had a flat tire and decided to have it repaired that day. He had no prior authorization to be absent. His supervisor thought he should be granted emergency annual leave for the six hours, but the Chief Correctional Supervisor vetoed that idea in writing on July 12, 1979, the day after he recommended appellant's termination.

Although appellant was AWOL as charged, we do not find that his absences created the situation alleged in the proposal letter. Considering that beyond these two incidents, appellant's attendance record bore no previous reprimand, we conclude that the charge is insufficient to justify his removal.

In summary, the first charge is found not to be supported by a preponderance of the evidence, and the second charge, although proven, does not support appellant's removal. Accordingly, the initial decision which sustained the agency's action is REVERSED.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Melvin Jackson
v.
U.S. Postal Service

Docket No.
DC075209200

Order

Appellant is a former motor vehicle operator who was removed for not qualifying as an operator or for any other available Postal Service job. As its basis for finding appellant unqualified as an operator, the agency relied on its earlier revocation of appellant's Federal driver's license. The presiding official found that the agency had not proved by a preponderance of the evidence that appellant's driving record warranted revocation of his license, and he reversed the removal.

The agency in its Petition contends *inter alia* that (1) the presiding official could not cite the lack of evidence supporting the revocation as his ground for reversal because appellant had not raised this matter in his Petition of Appeal and (2) the Board does not have jurisdiction to go behind the reason given for the removal, appellant's lack of qualifications for motor vehicle operator, and reach the question of whether appellant's driving record warranted the revocation.

At the hearing held by the Board's Washington Field Office on the appeal, appellant testified at length concerning his driving record. The agency did not object to this line of questioning on the grounds raised in its Petition. Moreover, the agency never raised these grounds by motion, argument or any other means during the course of the Field Office proceeding. We find that the agency's failure to present these grounds to the presiding official precludes it from raising them now in its Petition for Review. *Moses v. United States Postal Service*, 2 MSPB 193 (1980). See *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

We have carefully examined all other issues raised in the Petition and find that none meets the criteria set forth in 5 C.F.R. 1201.115.

The agency's Petition for Review is DENIED and the initial decision is AFFIRMED.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHARLES MALIZIA
v.
DEPARTMENT OF THE NAVY

Docket No.
CH075209184

OPINION AND ORDER

Appellant, a sheet metal mechanic, has recurring back problems. He suffered a work-related back injury on August 16, 1978. He received workmen's compensation from August 16 to November 6, 1978; from August 20, 1979, to August 31, 1979; and from November 28, 1979, to December 17, 1979. From September 1, 1979, to the time of his removal, he had been on assignments selected for him to accommodate the medical restriction placed on him by the agency doctor after the back problem recurred in 1979. He was removed because of alleged inability to perform the duties of his job. The record supports the charge.

The argument that the presiding official abused his discretion in not granting a delay for Dr. Kaiser, an orthopedist who had treated and diagnosed appellant, to be able to testify for appellant, and that Dr. Kaiser's testimony now constitutes new evidence, is meritless. The request for delay was based on the affidavit of counsel that Dr. Kaiser would testify that the physical condition for which appellant was found unfit for service "in fact" was caused by an accidental injury entitling appellant to the benefits of 5 U.S.C. 8151, which provides certain rights to employees who have been receiving workmen's compensation and who have overcome their disability. The presiding official questioned the relevance of Dr. Kaiser's testimony and pointed out the possibility of a stipulation prior to hearing. At hearing, the agency stipulated as to the work-relatedness of the injury and that it would not dispute the medical evidence in the record from Dr. Kaiser. Appellant did not express any dissatisfaction with the stipulation or then object to proceeding without Dr. Kaiser's testimony.

Moreover, the appeal filed April 4, 1980, states that 5 U.S.C. 8151 was violated by the adverse action because of disability that was work-related and that "a request for surgical care was pending" at the time the adverse action was taken. Appellant also claimed that jobs were available "within my medical limitation." Thus, appellant was not claiming that at the time of the removal action he had overcome his disability. He cannot claim now that he expected Dr. Kaiser to testify that he was not disabled *at the time of the adverse action.* Thus, we hold that appellant has failed to establish that new evidence is available to support the claims he was making at the time of the appeal.

Appellant's other arguments do not establish that the initial decision was based on erroneous interpretation of statute or regulation and thus fails to meet the criterion of 5 U.S.C. 1201.115(b).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHRISTINE B. SNELL
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
AT315H99007

OPINION AND ORDER

Appellant's employment was terminated during her probationary period, effective February 5, 1979, based on post-appointment reasons. Her appeal to the Atlanta Field Office included an allegation that the termination action was based on discrimination because of age and physical handicap. The presiding official found that the appeal was not within the Board's appellate jurisdiction. By timely petition to the Board, appellant seeks review of the initial decision.

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, which became effective on January 11, 1979, excludes probationers from those employees entitled to statutory appeal rights. 5 U.S.C. 7511(a)(1)(A). Moreover, the only allegations of discrimination which a probationer may properly appeal to the Board based on regulations issued by the Office of Personnel Management (OPM) are those involving partisan politics or marital status. *Walker v. Department of the Navy,* 4 MSPB 36 (1980). Reorganization Plan No. 1 of 1978 transferred the responsibility for ensuring equal employment opportunity for Federal employees to the Equal Employment Opportunity Commission, effective January 1, 1979. Allegations of discrimination based on race, color, religion, sex, national origin, age, and physical handicap, may only be reviewed by the Board when joined with an otherwise appealable action. 5 U.S.C. 7702(a)(1). Since the issues raised by appellant were not appealable to the Board, dismissal of the appeal was proper.

The petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CLARA L. WALKER v. DEPARTMENT OF THE NAVY	Docket No. SF315H99012

OPINION AND ORDER

Appellant's employment was terminated during her probationary period, effective March 16, 1979, based on post-appointment reasons. In her appeal to the Field Office, appellant alleged, *inter alia,* that the termination action had been based on discrimination because of her sex. The initial decision found that the appeal was not within the Board's jurisdiction. By timely petition dated May 10, 1979, appellant seeks Board review of the initial decision.

As this action was commenced by the agency subsequent to January 11, 1979, the effective date of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), the Board's review is governed by the Reform Act and appropriate implementing regulations.

The Reform Act does not identify a probationary termination as one of the type of actions appealable to the Board. 5 U.S.C. 7512. Moreover, 5 U.S.C. 7511(a)(1)(A) specifically excludes probationers from those employees entitled to statutory appeal rights.

The Reform Act further provides that discrimination of the types specified at 5 U.S.C. 7702(a)(1)(B), i.e., race, color, religion, sex, national origin, age, and physical handicap, may only be reviewed by the Board in connection with a matter otherwise appealable to the Board. 5 U.S.C. 7702(a)(1). These provisions are in keeping with the President's Reorganization Plan No. 1 of 1978, which transferred the responsibility for ensuring equal employment opportunity for Federal employees, as well as the responsibility for enforcing the Equal Pay Act and Age Discrimination in Employment Act, to the Equal Employment Opportunity Commission, effective January 1, 1979. Section 1-3 of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), and Notice of Transfer of Function, Fed. Reg. Doc. 78-36354 (1978).

The Reform Act, however, also vests authority in the Office of Personnel Management (OPM) to prescribe regulations to carry out the purposes of those subchapters relating to adverse actions. 5 U.S.C. 4305, 7503(a), 7504, 7511(c), 7513(a), 7543(a) and elsewhere. The former U.S. Civil Service Commission (CSC), the predecessor agency to the Board and OPM, had by regulations issued on December 29, 1978, made provisions for certain regulatory rights of appeal to the Board. *See* 5 C.F.R. 772.301 (1978), 43 Fed. Reg. 60857 (1978). Included as a matter appealable to the Board were appeals under 5 C.F.R., part 315, subpart H. Further, 5 C.F.R. 315.806(b) (1978) had previously provided for Commission review of probationary appeals involving the following issues:

> . . . discrimination because of race, color, religion, sex, or national origin; or age, *Provided,* That at the time of the alleged discriminatory action the employee was at least 40 years of age but less than 65 years of age, . . . (P)artisan political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap.

Accordingly, it would appear at first blush that 5 C.F.R. 772.301 (1978) continued probationers' entitlement to appeal separations under the same bases as previously existed at 5 C.F.R. 315.806(b) (1978), at least until OPM deleted Part 772 on August 7, 1979, 44 Fed. Reg. 46249. Such a result would, however, as noted above, clearly conflict with the President's Reorganization Plan No. 1 of 1978, as well as the relevant provisions of the Reform Act, particularly 5 U.S.C. 7702(a)(1). Moreover, under 5 U.S.C. 907(a), agency regulations in respect to a function which is subsequently affected by reorganization remain in effect "except to the extent rescinded, modified, superseded or made inapplicable." The Reform Act similarly provides that all rules and regulations affecting the Federal service shall continue except as otherwise provided in the Act. Pub. L. No. 95-454, 902(a), 92 Stat. 1223 (1978). It is manifest, then, that former CSC regulations could only remain in effect to the extent that they were not rescinded, modified, superseded or made inapplicable by the provisions of the President's Reorganization Plan No. 1 of 1978 and the Reform Act. The Board therefore finds that those portions of 5 C.F.R. 315.806(b) (1978) relating to allegations of discrimination based on race, color, religion, sex, national origin, age, and physical handicap, ceased to be applicable on the effective dates of Reorganization Plan No. 1 and the Reform Act. Thus, the only allegations of discrimination which a probationer may properly appeal to the Board are those based on partisan politics or marital status. Since appellant here has not alleged either of these type of discrimination, the Board lacks the jurisdiction to entertain her appeal.

The petition for review is DENIED. *See* 5 C.F.R. 1201.115.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THOMAS W. WELLS
v.
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Docket No.
PH531D09002

OPINION AND ORDER

The above case was REOPENED in view of the pendency of *Wells v. Harris*, 1 MSPB 199 (1979), which involved certain of the factual issues raised in the instant case.[1]

This case concerns the withholding of appellant's within-grade salary increase by his employing agency, the Social Security Administration, York, Pennsylvania. The presiding official of the Board's Philadelphia Field Office affirmed the withholding action, and subsequent to the Board's reopening of the case, appellant petitioned for review. The agency responded to the merits of the petition.

We have carefully considered the petition and found that it has raised no matter warranting our complete review of the record under 5 C.F.R. 1201.115.[2]

We find, however, that the presiding official erred regarding the scope of Board review and the applicable standard of proof. The presiding official limited his review to the question of whether there had been a valid basis for the agency's negative determination and subsequent reconsideration decision, or whether those determinations had been arbitrary and capricious. Consequently, he held that consideration of appellant's explanations regarding the circumstances surrounding many of the cited errors in his performance, and of his allegation of improper agency coercion and harassment, was beyond his authority. This was error. In *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), we held that the entire record before the Board, including all relevant evidence adduced at the hearing, must be considered in determining whether the agency's negative acceptable-level-of-competence (ALOC) determination has been sustained. (*Id.*, 499).

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[1] Upon review, we find that our Order for Corrective Action in that case, 2 MSPB 291 (1980), and the agency's verified report of compliance do not directly affect the issues raised by the instant appeal.

[2] Section 1201.113 of the Board's interim regulations, 44 Fed. Reg. 3946, 3952 (January 19, 1979), as in effect at the time of the instant appeal.

Further, we held that the requisite standard of proof which the agency must meet is substantial evidence, 5 U.S.C. 7701(c)(1)(A). (*Id.*, 504). Accordingly, in light of our decision in *Parker*, we have reviewed all of the record evidence, including appellant's explanations of the alleged errors.

The agency supplied twenty-one examples of mis-handled Social Security applicant claims, and appellant responded to each. Upon review, we find that appellant's explanations fail to counter the agency's evidence. For example, the agency gave instances where appellant failed to uncover the existence of eligible dependents. The errors were caught by later reviewers of the claims, but appellant's explanation is that the applicants didn't understand the law and so didn't report the possible eligibles. This explanation only demonstrates the truth of the agency's charge that appellant did not adequately interview the claimants. The several instances in which the agency's assistant district manager had to apologize to claimants for appellant's rudeness or error have not been explained away. In short, we find that appellant's explanations of his alleged errors notwithstanding, the agency has supported its negative ALOC decision with substantial evidence.

The presiding official analyzed appellant's allegations of harassment and coercion, but erroneously considered that making findings thereon exceeded his authority. Based upon the presiding official's analysis of those allegations and upon the record, we conclude that appellant failed to demonstrate such undue harassment or coercion.

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this opinion and order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 21, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES P. HALE
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075299037

OPINION AND ORDER

The appellant, a sheet metal worker with the Naval Air Rework Facility, San Diego, received a notice of proposed removal on January 24, 1979. The removal was effective March 2, 1979. On February 9, 1979, appellant was suspended for 14 days for being on duty under the influence of intoxicants. Consequently, he was not in full duty status during the entire notice period. During this period, he also entered the Navy's employee assistance program for alcoholics. The appellant filed an appeal with the San Francisco Field Office alleging procedural error by the agency in failure to follow the regulations governing the alcoholism program. The presiding official found no procedural error and affirmed the agency's action.

The presiding official found that the preponderance of evidence supported the charges, and the appellant did not contest them. He claimed that the agency should have given him the opportunity to enter the program for alcoholics and that this failure was a procedural error. The presiding official found that the agency had advised the appellant of the program and that it had complied with its own regulations. Therefore, he did not find any procedural error.

In his petition for review, the appellant has alleged erroneous interpretation of Public Law 91-616, which mandates the establishment of rehabilitation programs and services for alcohol abuse and alcoholism among Federal employees, and of the Naval Station's own regulations establishing such a program. The appellant has maintained that the Navy's regulations require the supervisor to "direct" the employee to such a program. It is his contention that he was never directed or ordered to such a program.

Under 5 C.F.R. 1201.115 (1979) the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

> or (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

The appellant in his petition cites part II, paragraph 3.f of CCMMI 12792.4 (instructions), which reads as follows:

> f. Directing the employee to report to a contact and referral counselor, if as a result of the first discussion, the employee does not improve the unsatisfactory job performance or conduct.

Referring to the above subsection, the appellant contended that he should have been ordered to participate in such a program by the agency.

He also cited CMMI 751.1, Subchapter 2-2.b(3), entitled Specific Disciplinary Situations, as follows:

> . . . As provided for in CCMM Instruction 12792.4, removal action will not be initiated against an employee when alcoholism is an underlying factor until provisions of that instruction have been met.

Appellant has averred that his supervisors knew of his alcoholism, but did not order him to a program. Therefore, he has contended that this failure constituted a fatal procedural error.

The presiding official determined that the Navy regulations governing alcoholism require the employee to take the initiative and advise the employer of the problem first. Then, the employer must insure that the employee is introduced to the program. The appellant in this case did not advise his supervisors about any problem, and when asked, he denied any drinking problem.

The testimony of Mr. Hernandez and Mr. Kenniston, both supervisors of the appellant, established that they recognized that the appellant might have a drinking problem and advised him about the program on the base. Mr. Hernandez testified that his discussion took place in July, 1978 and that after the discussion he called the program director, Mr. Matheny. He explained that the appellant denied having any problem and asked what could be done. Mr. Matheny indicated that with such an attitude there was nothing further to be done. Mr. Kenniston against discussed the program with appellant when he was counseling him about his absences and tardiness in December. In addition, the appellant admitted having been enrolled in a community program for persons convicted of driving under the influence, which ended in the summer of 1978.

The Navy's alcoholic program is defined in its instructions, OCMMINST 12792.4 (Enc.1), as:

> A management technique by which assistance is *made available* to employees who have serious personal problems which,

> over a period of time, result in significant impairment of job performance or conduct, as well as to employees *who recognize their problems and voluntarily seek help before the impairment becomes a matter of concern to management.* (Emphasis added.)

The basic premise of the program as interpreted by the presiding official is the recognition by the employee that he/she has a problem and his/her willingness to accept assistance. Therefore, the presiding official found that the agency had complied with its regulations when the appellant was advised to seek help and informed of the agency's program.

The issue raised in the petition for review is whether the agency was required by its own regulations to take further action to afford the appellant a reasonable opportunity to obtain treatment for his drinking problem before his removal.

Considering the regulation governing the supervisor's responsibility in the employee assistance program, the Board finds no error in the presiding official's interpretation that the supervisor need only advise the employee of the program after the employee has acknowledged the problem; nor does the Board find any error in the interpretation of the other regulations governing this program. The facts noted above show that the presiding official properly found that the supervisor's actions met the applicable requirements.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by the appellant.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 22, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CALVIN J. HILL
v.
U.S. POSTAL SERVICE

Docket No.
NY075299032

OPINION AND ORDER

Appellant was removed from his position with the U.S. Postal Service, Monsey, New York, for absence without leave from October 23, 1978, to February 12, 1979. On October 4, 1978, appellant left the Post Office on approved annual leave which was later extended to October 13, 1978. When appellant failed to return or to request further leave, the agency wrote him on November 2, 1978, requesting that he either return to active duty or submit justification for the unauthorized absence. No response was made to that letter, and on November 29, 1978, the agency proposed appellant's removal for absence without leave (AWOL). The agency thereafter received a letter dated December 7, 1978, from the Veterans Administration Hospital, Tuskegee, Alabama, stating that appellant was admitted to that hospital on November 9, 1978, and was still confined there.

Because of that letter, the agency took no further action to remove appellant until February 12, 1979, after appellant had indicated that he wished to be removed from the service. However, in his oral reply to the new proposed notice of removal, appellant stated his desire to return to work. He was informed that his current fitness for duty would have to be established before that could occur. Consequently, on February 22, 1979, appellant submitted to the agency medical statements relating to his recurrent mental condition. Thereafter, a psychiatric fitness-for-duty examination was scheduled for March 26, 1979. Nevertheless, the agency effected appellant's removal on March 20, 1979. Appellant failed to keep the appointment, and the action to restore him to duty, or possibly to reinstate him, was not further pursued.

On appeal, the presiding official found the AWOL charge supported by a preponderance of the evidence and sustained the removal action.

The petition for review, referring to certain attachments thereto, merely stated as follows:

I. Indicates that I was in confinement (and I did not get any outside information from wife or anyone else) at this time.

II. Hospital Summary (read for yourself).

III. Two hundred and thirty-five signatures, also Mayor of town.

IV. I am on welfare and I need my job.

Based on the evidence of record, the Board finds that it should have been apparent to the agency, upon receipt of appellant's February 22, 1979 submission of the medical statements, that his absence was related to his recurrent mental illness. Appellant had had a history of mental problems since his military service in Vietnam. The agency was aware of the nature of appellant's psychiatric problems as evidenced by the following extract from a February 27, 1979 letter by the Postmaster requesting an appointment for a psychiatric fitness-for-duty examination for appellant:

> Mr. Hill has had a history of psychiatric treatment going back to May, 1974 at which time he apparently suffered a mental breakdown while at work and had to be apprehended by the police and was admitted to Rockland State Hospital, Orangeburg, N.Y. and subsequently sent to the V.A. Hospital at Montrose. He was discharged in June of 1974 and was readmitted in Sept. 1974. He was admitted again in July 1977 and discharged September 1977. He was readmitted in Oct. 1977, was discharged and admitted to the V.A. Hospital in Birmingham, Alabama in Nov. 1977, and now this latest series of treatments.

An agency may not separate an employee who meets the service requirements for disability retirement and whose mental condition impairs his judgment and ability to make decisions without first advising him of his right to apply for disability retirement or applying for disability retirement on his behalf. *See Anderson v. Morgan*, 263 F. 2d 903 (D.C. Cir.), cert. denied 361 U.S. 846 (1959), and 39 Comp. Gen. 89 (1959).

In the instant case, appellant had completed the 5 years of civilian service required for disability retirement under 5 U.S.C. 8337(a). Further, appellant's AWOL problems appear to have been significantly related to his psychiatric disorders. Nevertheless, the agency, despite its obvious awareness of appellant's mental condition, effected his removal without considering his involuntary retirement for mental disability. *See* 5 C.F.R. 831.1203. We therefore find that the agency acted improperly in removing appellant prior to a determination of his psychiatric fitness for duty, and in failing to inform him of his eligibility for retirement or applying for disability retirement on his behalf.

Accordingly, the petition for review is GRANTED. The initial decision is hereby VACATED and the agency's action removing the appellant is hereby REVERSED.

This is the final decision of the Merit Systems Protection Board on this case. The agency is hereby ordered to cancel the removal action and to provide evidence of compliance with this decision within 10 days of receipt of this Opinion and Order to the Board's New York Field Office.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD FREEMAN
v.
VETERANS ADMINISTRATION

Docket No.
NY075209078

ORDER

The petition of February 25, 1980 requesting that the Board review the February 22, 1980 initial decision of the presiding official is GRANTED.

Upon review, the Board finds that the appellant requested a hearing in this matter, by letter received in the field office on December 26, 1979. Appellant had been informed of his right to request a hearing within 10 days of receipt of the December 13, 1979 letter from the Acting Chief Appeals Officer. Inasmuch as appellant stated that he received the letter on December 15, his response, sent by certified mail, is deemed to be timely. Nonetheless, no hearing was granted.

An appellant has a right to a hearing before the Board in connection with matters which are appealable to the Board. 5 U.S.C. 7701(a)(1) and 5 C.F.R. 1201.24(c). Since there is no reason in the record for denial of the hearing, the Board hereby vacates the decision of the presiding official and remands the case for hearing and a new adjudication.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SIDNEY E. HARMAN, JR.
v.
DEPARTMENT OF THE NAVY

Docket No.
PH075209004

OPINION AND ORDER

The appellant was reassigned from a position of Supervisory Naval Architect, GS-871-13, to a position as a General Engineer, GS-801-13 with the Supervisor of Shipbuilding Conversion and Repair, Department of the Navy. He appealed to the Board's Philadelphia Field Office. Therein the appellant contended that because the previous position had promotional potential to the GS-14 level, the reassignment was an adverse action and was therefore appealable to the Board under 5 U.S.C. 7512 *et seq.* The presiding official concluded that because 5 U.S.C. 7512 *et seq.* does not provide an appeal right from an agency action reassigning an employee, which reassignment results in no reduction in pay or grade, the appellant had no statutory right of appeal and the appeal was dismissed. The petition for review, dated November 7, 1979 and received by the Board on November 13, 1979, asserts that the initial decision involved a misapplication of the term "reduction in pay or grade" because the recruiting document for the appellant's previous position (Supervisory Naval Architect) stated that the selectee may be promoted to a GS-14 level "without further competition." In response to his petition, the Department of the Navy asserted that the appellant's previous position is a GS-13 position.

The Board has the authority to hear and decide all matters within the Board's appellate jurisdiction, as conferred by law, rule or regulations. 5 U.S.C. 1205(a) (1); 5 C.F.R. 1201.3. However, neither law, rule, or regulations provide for appellate jurisdiction over reassignment personnel actions. Because this action did not result in a reduction of either pay or grade, the initial decision correctly noted that the Board had no authority to entertain the appeal. *Lange v. Department of Transportation,* 2 MSPB 110 (1980). The Board therefore finds that the initial decision did not involve a misapplication of the term "reduction in pay or grade." [1]

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[1] We note that the evidence of record supports an inference that appellant's transfer was effected after a finding of racial discrimination against a fellow

Accordingly, the petition of review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 23, 1980*

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employee. In essence, appellant was "bumped" from the supervisory Naval Architect position because of a finding of discrimination in the selection process. Although this fact does not give rise to any expansion of the Board's jurisdiction, we think it peculiar that the agency chose this course of action in remedying the Black employee's claim. 29 C.F.R. section 1613.271(b) neither mandates nor suggests such response to a finding of discrimination. As the court stated in ***Patterson v. American Tobacco Co.***, 535 F.2d 257, 268 (4th Cir. 1976):

> The enactment of Title VII was the result of many concessions, including the unequivocal assertion by proponents of the legislation that it was not intended to be used to displace incumbent workers . . . Demoting employees, especially those who are not responsible for wrongdoing, undoubtedly would encounter more resistance than deferring their future expectations.

The court concluded:

> Since full monetary compensation and the removal of barriers to promotion provided adequate relief to minority employees without disruption to other employees and management, we concluded that neither Title VII nor its legislative history requires bumping in this case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN F. LEONARD
v.
U.S. POSTAL SERVICE

Docket No.
BN075299011

ORDER

By letter dated October 2, 1980, appellant Leonard's attorney requested that the Board reconsider its September 23, 1980, decision in the instant appeal because it appeared not to give consideration to his July 31, 1980, memorandum in support of appellant's petition for review.

Having examined the matter, the Board finds that the July 31 submission was properly excluded from consideration. Appellant filed his petition *pro se* by letter of August 3, 1979. On July 3, 1980, his attorney requested permission to supplement the petition. By letter of July 24, 1980, the Secretary of the Board informed him that the Board's regulations do not contemplate further filings after the initial submissions of the parties, but that such a filing could be made "subject to a showing . . . of the reasons for the delay in making the submission, and subject to a further finding that it meets the regulatory requirements of 5 C.F.R. 1201.115."

The July 31, 1980, letter attempts to justify the lateness of the submission by relying on the agency's failure to inform appellant that he could designate an attorney to represent him in the proceedings before the Board.

The Board finds that insufficient reason had been advanced by the July 31 letter to warrant the reopening of the record. The agency's purported failure to inform appellant of his right to representation is not determinative, inasmuch as the Board's regulations set forth that right. On receipt of the petition for appeal, by letter dated May 8, 1979, the presiding official informed the appellant, *inter alia:*

> The Board requires that the parties designate their representative, if any, in writing. If you choose to have a representative and have not already done so, you must notify this office immediately in writing of the name, address, and telephone number of the person you have authorized to act in your behalf. A 'Designation of Appellant's Representative' form is enclosed for your convenience.

. . . .

> The Board's appellate regulations are found in Title 5, Code of Federal Regulations, Part 1201. These are available for review in the offices of the Board, agency personnel or employee relations offices, and in some large public libraries. We urge all parties to review these regulations for detailed information on the practices and procedures followed by the Board in processing an appeal.

Accordingly, the request for reconsideration is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby informed of his right to appeal this decision in accordance with 5 U.S.C. 7703, provided that such appeal is filed within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES E. PIERCE
v.
U.S. POSTAL SERVICE

Docket No.
DC075209028

OPINION AND ORDER

The agency removed the appellant from the position of Distribution Clerk for being "absent from assignment without permission and excessive time spent on an official break," citing certain past disciplinary actions in support of its selection of the penalty. The presiding official reversed the agency's decision after a hearing at which both sides were represented, and witnesses testified on behalf of the agency and appellant, including the appellant himself. The presiding official found that the agency did not meet its burden of proving its decision was supported by a preponderance of the evidence. In addition, he found that appellant had not met his burden of proving his contention of racial discrimination.

The agency-filed petition requested that the Board review the presiding official's initial decision. In addition to rearguing the factual issues, the agency's petition for review contended that the presiding official's decision involved an alleged erroneous interpretation of statute or regulation in that "the burden of proof standard was erroneously interpreted in this case, and the initial decision did not contain all material issues of fact and law as presented on the record." The agency also asserted that the presiding official misapplied the preponderance of evidence standard because his analysis did not adequately consider the entire record as required by the definition contained in 5 C.F.R. 1201.56(c)(2). The agency argued further that the presiding official did not satisfy 5 C.F.R. 1201.111(b)(1), which states that:

> Each initial decision shall contain:
>
> Findings of fact and conclusions as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record.

The Board has considered the case with particular focus on the presiding official's decision, and has determined that the presiding official's decision requires further clarification and elaboration concerning his application of the preponderance of the evidence standard as required by 5 U.S.C. 7701(c)(1)(B) and 5 C.F.R. 1201.56(a)(ii), and as defined in 5 C.F.R. 1201.56(c)(2). The Board cannot determine from the initial decision whether the presiding official actually considered the entire record in applying the preponderance of the evidence standard.

In *Spithaler v. Office of Personnel Management*, 2 MSPB 2, 2 (1980), the Board interpreted 5 C.F.R. 1201.111(b)(1) to mean that:

> . . . an initial decision must identify all material issues of fact, summarize the evidence on each such issue sufficiently to disclose the evidentiary basis for the presiding official's findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved and why, describe the application of burdens of proof, and address all material legal issues in a fashion that reveals the presiding official's conclusions of law, legal reasoning and the authorities on which that reasoning rests.

The presiding official's initial decision in this case does not contain specific "findings of fact . . . as well as the reasons or bases therefor, upon all material issues of fact." For example, absent from the initial decision is a specific finding as to where the appellant was during the periods in question, March 22 and 23, 1979, and why the testimony of either the appellant or the supervisor on this point was more credible. Little reference was made to the record in the single paragraph in the decision in which the charge was analyzed. Recounting the evidence adduced at the hearing and drawing a general conclusion therefrom, without providing the reasons therefor, or including any discussion of how any credibility questions were resolved and why, is insufficient. In *Weaver v. Department of the Navy*, 2 MSPB 297 (1980), the Board stated:

> . . . in reviewing an initial decision, this Board is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning.
>
> In undertaking such reviews, however, the Board must recognize that demeanor evidence cannot by its nature be reflected fully in the written transcript, with the result that the Board must depend heavily upon the presiding official's assessment of witness credibility, at least when there are not other, perhaps more persuasive, indicia of credibility included in the record. For this reason, when questions of credibility are presented, due deference must necessarily be given to the

assessment of the presiding official who was present to hear and observe the demeanor of the witnesses.[1]

The Board, therefore, must have the benefit of the presiding official's determinations of fact, reasoning and assessment. Obviously, in this case it does not.

The agency having established that the presiding official's decision is based on an erroneous interpretation of statute or regulation, the petition for review is GRANTED, the initial decision VACATED, and the case REMANDED for a new adjudication in accord with law and regulation, cited herein, and consistent with this Opinion and Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 23, 1980*

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[1] *See Universal Camera Corp v. NLRB*, 340 U.S. 474, 496 (1951).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CLARENCE RICHEY
v.
SOCIAL SECURITY ADMINISTRATION
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

Docket No.
CH075299060

ORDER

This case involves an agency decision to remove the appellant under the provisions of 5 U.S.C. 7511, on two charges of misconduct, and under the provisions of 5 U.S.C. 4303, for unacceptable performance. The initial decision of the presiding official sustained one of the charges under Chapter 75, and that portion of the agency action taken under 5 U.S.C. Chapter 43. On December 17, 1979, the Board issued its decision in *Wells v. Harris*, 1 MSPB 199 (1979). This case was reopened by the Board since it is directly affected by the Board's May 20, 1980, Order of Corrective Action in *Wells*.

Accordingly, the Board hereby REVERSES the initial decision with respect to the Chapter 43 finding and REMANDS the case to the field office for reconsideration and a new determination of whether the remaining sustained charge under Chapter 75 alone warrants a finding sustaining the agency removal action. The presiding official shall allow the parties a reasonable opportunity to supplement the record on this matter by way of argument or evidence.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRENDA J. ROBERTS
v.
DEFENSE LOGISTICS AGENCY

Docket No.
AT035109044

OPINION AND ORDER

The agency separated appellant from her position as Clerk-Typist, GS-1, through reduction-in-force (RIF) procedures. The presiding official of the Board's Atlanta Field Office reversed the action, as she found that appellant had established that the decision to separate her had been based on a personnel practice prohibited by 5 U.S.C. 2302(b) (1) and by section 717 of the Civil Rights Act of 1964, as amended. Specifically, she found that appellant had been separated in reprisal for her having brought a complaint of racial discrimination to the Equal Employment Opportunity Commission. The agency has petitioned the Board for review.

In its petition, the agency points out that the appellant presented evidence of racial discrimination and reprisal at the hearing, without having specified in her appeal petition that that would be presented as an affirmative defense. The agency argues that its representative at the hearing, being unprepared for this defense, did not have a fair opportunity to introduce evidence disproving a causal connection between the RIF and appellant's preceding EEO complaint.

Affirmative defenses may properly be raised at the hearing even if they are not stated in the appeal petition. 5 C.F.R. 1201.55(a), (b). In such a case, an agency has every opportunity under the Board's rules to plead surprise and request either a continuance of the hearing to present additional witnesses and evidence, 5 C.F.R. 1201.51(c), or that the record be kept open for the submission of additional statements, 1201.57(a). The record shows that the agency had a reasonable opportunity to refute the allegation, 5 C.F.R. 1201.155(d), but that it made no such requests, and did not object to any of the evidence presented at the hearing. Therefore, we decline to exercise our authority under 1201.117 to reopen this case so as to allow the agency to introduce additional evidence, and the agency's petition for review is DENIED.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this Order.

This is the final Order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this Order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this Order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this Order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 23, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

James D. Alton
v.
Veterans Administration

Docket No.
CH043209002

Order

Appellant was demoted by the agency for allegedly failing to meet the performance requirements of his position. The initial decision found the demotion to have been supported by substantial evidence and affirmed the action pursuant to 5 U.S.C. 4303. Appellant filed a timely petition for review of the initial decision.

In its December 17, 1979, decision in *Wells v. Harris*, 1 MSPB 199 (1979), the Board held that agencies must have a properly established performance appraisal system in place prior to taking actions under 5 U.S.C. 4303. The Board further held that in the absence of such a system, performance-based actions could still be taken pursuant to 5 U.S.C. Chapter 75, but that the higher preponderance of the evidence, burden of proof, and more difficult standard of demonstrating that the action promotes the "efficiency of the service" would be applicable. *Id.*, 236.

The existing record in this case does not show that appellant's demotion was taken under a properly established performance appraisal system. Accordingly, the case is hereby REOPENED and REMANDED to the field office for reconsideration in light of *Wells*.

The presiding official shall provide copies of the Board's decision in *Wells* to all parties. In conjunction with this reconsideration, the presiding official shall determine whether the action was taken under a performance appraisal system approved by the Office of Personnel Management pursuant to 5 U.S.C. 4304. The presiding official shall receive such documents or take such testimony as is deemed necessary to make this determination. If the action was taken under such a system, the presiding official shall reinstate his earlier decision.

In the event the presiding official determines the action was not taken under such a system, the presiding official shall provide the agency twenty (20) days in which to request reconsideration of the case under the standards of 5 U.S.C. Chapter 75. If the agency so requests, the presiding official shall provide the parties a reasonable time in which to present any supplemental documentary or testimonial evidence concerning the issue of whether, by a preponderance of the evidence, the action was taken for "such cause as will promote the efficiency of the service." The presiding official shall then issue a new adjudication under the standards of Chapter 75 upon the existing record as supplemented. If the agency does not elect to request reconsideration under the standards of Chapter 75, the agency action shall be reversed as not authorized by 5 U.S.C. 4303.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Frederick M. Clark
v.
Department of the Navy

Docket No.
BN075209012

Opinion and Order

Appellant was removed from his position as Pipefitter, effective July 13, 1979. Appellant's representative requested the chief appeals officer of this Board's Boston Field Office for an extension of the Board's 20-day time limit for filing a petition for appeal under 5 C.F.R. 1201.22(b). The representative requested that the Board waive the time limit until 20 days after appellant's receipt of an arbitrator's decision determining whether the agency's removal action was arbitratable through a negotiated grievance procedure between the agency and appellant's union. The chief appeals officer informed appellant's representative by letter that an extension of the time limit for filing an appeal with the Board was inadvisable as the issue of the grievability of the removal action could not be resolved expeditiously if it was submitted to aribtration. Appellant, thereafter, timely filed a petition for appeal.

After affording appellant a hearing on the merits, the presiding official issued an initial decision in which he found that the agency's charges were supported by the preponderance of the evidence and that appellant's removal would promote the efficiency of the service.

Appellant timely filed a petition for review. The petition does not set forth any objections to the findings of fact and conclusions of the initial decision, but instead, asserted that the Field Office erred in denying appellant's request for an extension of the time limit for filing a petition for appeal in order to obtain a determination of the arbitrability of the removal action under the negotiated grievance procedure. The agency's response asserted that our chief appeals officer did not err, as appellant had the right to attempt to arbitrate his removal through the negotiated grievance procedure or to appeal the matter to the Board under 5 U.S.C. 7701, but not the right to exercise both routes of review. 5 U.S.C. 7121(e)(1); 5 C.F.R. 1201.3(b)(2).

The policy of this Board is to assure, in accordance with the mandate of Congress in passing the Civil Service Reform Act of

1978, that cases are processed in an expeditious manner. *See Hersman v. National Science Foundation*, 2 MSPB 132, 134 (1980). This Board is not obligated, as appellant requested, to extend indefinitely the time for filing a petition for appeal pending the disposition of matters which affect neither the jurisdiction of the Board to hear the case nor the merits of the case. An indeterminate delay of the proceeding, without a demonstration of good cause, is not consonant with the Congressional mandate for the expeditious processing of appeals with due regard to the rights of all parties. We find that the presiding official properly determined that appellant did not show good cause under 5 U.S.C. 1201.12 for waiving for an indeterminate period the time for filing a petition for appeal.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The inital decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHARLES O. DONALDSON, JR.
v.
U.S. POSTAL SERVICE

Docket No.
SF075299061

OPINION AND ORDER

The appellant, Charles O. Donaldson, Jr., petitioned the San Francisco Field Office of the Merit Systems Protection Board for appeal of his dismissal from the position of Distribution Clerk Machine (MPLSM) with the agency, the Postal Service, for failure of a routine examination measuring knowledge of a distribution scheme for which he was responsible. He had been appointed to work on that scheme in July of 1978, upon recovery from a compensable work-related head injury within one year of its incurrence. In February of 1979, he failed the scheme examination for the third time, and the agency proposed his removal on that basis.[1] The appellant opposed his removal on the grounds that his memory and concentration lapses as a result of his compensable injury were only temporary, as evidenced by his medical reports. He requested reassignment to a Mail Handler position in lieu of removal, but that request was refused by the agency "based on . . . attendance, accidents and productivity."[2] Instead, the agency effected his removal.

In an initial decision dated August 8, 1979, the presiding official affirmed the agency's removal action, finding that the charges were supported by the preponderance of the evidence and that removal promoted the efficiency of the service.[3] The appellant then petitioned for review of that decision, charging that it erroneously interpreted 5 U.S.C. 8151 in denying him full restoration upon recovery from a compensable work-related injury.

The Board hereby GRANTS the petition for review, but finds that the record is not developed to the point where a final disposition can be made on review.

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[1] A notice of removal had been issued in October or November of 1978, but it was withdrawn by the agency "based on employee's recovery from physical disability." Agency Letter dated November 24, 1978. The second notice gave the appellant thirty days in which to retake and pass the examination, but there is no indication in the record that he took the examination again.

[2] Agency Memorandum dated May 1, 1979.

[3] Acting *pro se*, the appellant expressly waived his right to a hearing. The initial decision was based, therefore, on the agency's case file and the written submissions of the parties.

This case is not a simple removal action, as it was treated by the presiding official. The record indicates that the appellant was awarded disability compensation for incurring his work-related head injury. Nonetheless, there is no indication as to whether the appellant was restored to his former or an equivalent position upon full recovery and cessation of disability compensation within one year after the compensation began, pursuant to 5 U.S.C. 8151(b) and 5 C.F.R. 353.302(b), or whether he was restored upon partial recovery from his compensable injury, pursuant to 5 C.F.R. 353.306. This determination is crucial with regard to the extent of the appellant's right to restoration. Under the former circumstances, the right to restoration is absolute—the agency is required to restore the employee "immediately," 5 C.F.R. 353.302—, whereas under the latter circumstances, the agency is required only to "make every effort to restore" the employee, 5 C.F.R. 353.306. The right to restoration is a significant one in both cases, but the obligation of the agency differs in degree.

In an appeal to the Board based on a denial of the right to restoration, we must determine the extent of that right and the extent to which the agency has met its obligation under that right. *See* 5 C.F.R. 353.401. The right to restoration does not automatically terminate upon full or partial restoration if subsequent agency action vis-a-vis the restored employee relates to the compensable disability. In an appeal of a removal action resulting from a compensable disability, the agency has the burden of proving that it met its obligation under the appellant's right to restoration. That is, the agency must establish that there was no "equivalent" or other satisfactory position for which the appellant qualified in the case of full recovery within one year, or that there was no other available position for which the appellant qualified in the case of partial recovery.

Concomitant with the right to restoration in cases such as this, where adverse effects of the compensable disability linger, is the right to "reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee." 29 C.F.R. 1613.704(a). If the handicap is expected to be only temporary, as here, reasonable accommodation might include a temporary reassignment. *See* Office of Personnel Management, Handbook on Reasonable Accommodation, at 10 (1980). In any case, reasonable accommodation may be denied by the agency only if it can demonstrate that such "accommodation would impose an undue hardship on the operation of its program." 29 C.F.R. 1613.704(a).

The record in this appeal thus also lacks development on the appellant's right to reasonable accommodation. The presiding official took official notice of a negotiated agreement between the agency and its employees' union requiring bidding for any vacancy announcement, with the senior bidder receiving the assignment in question. Initial Decision at 4. The agency presented no evidence, however, as to the precise provision of the agreement, whether exceptions may be made for unannounced positions, or how the agency circumvented the agreement in restoring the appellant initially.

Accordingly, the initial decision dated August 8, 1979, is hereby VACATED, and this appeal is REMANDED to the San Francisco Field Office for determination of the restoration and reasonable accommodation issues in accordance with the foregoing opinion. The presiding official shall afford both parties a reasonable opportunity to submit additional evidence or argument on the issues identified herein.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN M. DOLES
v.
U.S. POSTAL SERVICE

Docket No.
DC075209119

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on February 29, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

In his petition for review, appellant alleged that the presiding official abused his discretion in refusing to grant appellant a continuance at the start of the hearing. The record shows that appellant had already been granted, prior to his request at the hearing, one continuance, due to the illness of his designated representative, and that at the time of his first request for a continuance, he advised the field office that it would be necessary for him to designate a new representative "whose name will be communicated to you when selected." Appellant never advised the agency of his designation of a new representative. At the hearing, appellant explained that his representative of record was recovering from a heart attack and was unable to attend. He also requested a continuance until a new representative could be certified.

The Board finds that the presiding official properly denied appellant's second request for a continuance. Appellant knew at the time of his first request for a continuance that he would have to find someone else to represent him. Even though more than one month had elapsed by the time the hearing took place as rescheduled, appellant apparently made no effort to obtain another representative.

Furthermore, appellant failed to comply with the Board's regulations at 5 C.F.R. 1201.51 which provide that motions for postponement by either party shall be in writing and accompanied by an affidavit setting forth the reasons for the request and shall be granted only upon a showing of good cause.

Appellant's petition for review also alleges that he discovered new and material evidence that, despite due diligence, was not available when the record was closed. Appellant contended that he discovered, subsequent to the hearing, that the agency had obtained affidavits from three of his coworkers who were eyewitnesses to an incident upon which the agency's charges were partially based. Appellant argued that these affidavits rebutted the testimony of the agency witness to the incident, and that despite the information contained in these affidavits, the presiding official stated that the agency witness was the only witness to the incident and sustained the agency's charges.

We find no merit in appellant's argument. The three affidavits cited by appellant in his petition for review were part of the agency record forwarded to the field office. The Board's record shows that appellant received copies of the agency record prior to the hearing. Accordingly, these affidavits cannot be considered new evidence. Furthermore, the statements by the affiants do not corroborate appellant's version of this incident. Therefore, the Board finds that even presuming that the presiding official failed to consider these affidavits, the preponderance of the evidence supports the charges as stated in the notice of removal. Moreover, we interpret the presiding official's statement regarding the fact that there was only one witness to the incident to mean that this was the only witness to testify at the hearing. We do not think that this comment indicates that the presiding official failed to consider the affidavits in the record.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALONZO L. GILLINS
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075209040

ORDER

The initial decision in the above-styled case is REOPENED, REVERSED, and REMANDED to the San Francisco Field Office.

The submissions of both the appellant and the agency to the field office show that appellant had raised an allegation of discrimination based on race and sex in connection with his appeal. Nonetheless, the initial decision of November 16, 1979, did not consider or decide this issue. The Board has held that when an issue of prohibited discrimination is raised in an otherwise appealable action, the appeal shall be processed as a "mixed case" under U.S.C. 7702. *Hall v. U.S. Postal Service*, 2 MSPB 1 (1980). *See* also *Gipson v. Veterans Administration*, 1 MSPB 420 (1980). In reconsidering this case, the presiding official shall provide the parties an opportunity to present supplemental documentary or testimonial evidence.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KENNETH D. WHITTINGTON
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
AT035109028

OPINION AND ORDER

This matter is before the Board on the agency's petition for review of the initial decision issued on March 13, 1980. In that decision, the Board's presiding official reversed the agency's reduction-in-force (RIF) action on the basis that the agency incorrectly computed Mr. Whittington's representative rate under 5 C.F.R. 351.703. The agency has petitioned for review on the basis that the presiding official, in taking judicial notice of an article in the *Federal Employees News Digest, Inc.* which reprinted a schedule for the administration's proposed 7% pay raise, erred in interpreting 5 C.F.R. 351.703(b). That regulatory provision reads as follows:

> Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific notices of reduction in force, except that when it is *officially known* on the date of issuance of notices that new pay rates *have been approved* and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.
> (Emphasis supplied.)

The plain reading of this regulation is that there is but one exception to the rule that the determinative pay rate is that in effect on the date of issuance of the reduction-in-force notice. That one exception occurs when the pay raise is "officially known" and has "been approved." Clearly, publication in the *Federal Employees News Digest, Inc.* of a proposed pay raise does not constitute official notice for the purposes of 5 C.F.R. 351.703(b) inasmuch as that document was not "printed by authority of the government." Cf. *United States v. Aluminum Co. of America,* 1 FRD 71 (S.D.N.Y. 1939). Moreover, a proposed pay raise is not a "new pay rate [which has] been approved."

Accordingly, the agency's petition for review is GRANTED and the initial decision of March 13, 1980 is REVERSED. The agency's reduction-in-force action with respect to Kenneth W. Whittington is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MILTON C. ANDERSON
v.
DEPARTMENT OF DEFENSE
DEPENDENT SCHOOLS

Docket No.
DC043009004

OPINION AND ORDER

The agency has petitioned for review of the initial decision issued on November 30, 1979, reversing the removal of appellant for unacceptable work performance. In substance, the agency contends that its charges were supported by substantial evidence and that it was not served with some of the material submitted to the presiding official by the appellant.

Our review of the record indicates that the agency was not served with material submitted to the presiding official by the appellant which were received on September 17, 1979. Section 1201.61 of the Board's Regulations [1] requires such service by the Board.

We also note that the removal action was brought and decided by both the agency and the presiding official pursuant to 5 U.S.C. 4303. Section 7701 of the Civil Service Reform Act requires that actions brought under 5 U.S.C. 4303 be supported by substantial evidence,[2] and such standard of proof was used by the presiding official. Subsequent to the initial decision, the Board, in the case of *Thomas W. Wells, et al. v. Patricia R. Harris, et al.*,[3] held that in the absence of an approved performance appraisal system established in accordance with 5 U.S.C. 4302 and 5 U.S.C. 4304, actions may not be brought pursuant to 5 U.S.C. 4303.[4] Rather, such unacceptable performance cases must be brought pursuant to Chapter 75 of Title 5 of the United States Code. Chapter 75 requires that the agency prove its charges by a preponderance of the evidence[8] and demonstrate that the action will promote the "efficiency of the service."

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[1] 5 C.F.R. 1201.61.

[2] Substantial evidence is defined by 5 C.F.R. 1201.56(c) as that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

[3] *Thomas W. Wells, et al. v. Patricia R. Harris, et al.*, 1 MSPB 199 (1979).

[4] *Wells*, 214.

In light of the failure to serve the agency with information submitted by the appellant, and the erroneous application of the "substantial evidence" standard rather than the higher standard of "preponderance of the evidence," the agency's petition for review is GRANTED.

Having granted the petition for review, we have thoroughly reviewed the record and the initial decision to determine whether either the lack of service or the application of the incorrect burden of proof warrants changing the ultimate resolution of this proceeding. As detailed below, we believe that they do not. Accordingly, the initial decision is AFFIRMED as modified by this opinion.

The material submitted by the appellant on September 17, 1979, cannot be regarded as decisionally significant, and thus the procedural error of lack of service was not harmful. The submission consisted of appellant's objection to the agency's filing of written notes summarizing his oral reply to the agency's deciding official, a copy of appellant's honorable discharge from the United States Army, a certificate awarded appellant for twenty years of federal service, and six satisfactory performance ratings. The presiding official correctly held that there was no error in the submission of the written notes by the agency, and did not in any way rely on the remaining materials in reaching her decision. Rather, the initial decision was based solely on the agency's failure to provide substantial evidence in support of its charges.

While the agency submitted detailed charges and specifications against appellant, these constitute nothing more than allegations. We agree with the presiding official's conclusion that the agency did not submit sufficient evidence to prove such allegations, even when the lesser standard of substantial evidence is applied. Thus, the agency's evidence certainly could not meet the more stringent standard of preponderance of the evidence. Accordingly, the error in the application of the standard of proof was of no consequence to the presiding official's decision.

CONCLUSION

The petition for review is GRANTED and the initial decision is AFFIRMED in accordance with this opinion.

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[8] Preponderance of the evidence is defined by 5 C.F.R. 1201.56 as that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 27, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WALTER SMITH v. DEPARTMENT OF THE NAVY	Docket No. AT075209167

OPINION AND ORDER

Appellant was removed from a position with the U.S. Army Corps of Engineers based on a charge that he had on his person, or in his possession, a firearm while on board a Bunk Barge in violation of policy and regulations. In his letter of appeal to the Board's Atlanta Field Office, appellant stated that he was prepared "to present all of my evidence either orally or in the form of interrogatories." The presiding official, in his letter acknowledging the petition, advised appellant as follows:

> If you requested a hearing in your petition, it will be held as soon as possible after receipt of the agency submission. If you did not request a hearing in your petition for appeal, you may amend your petition to submit such a request within ten calendar days after your receipt of this letter. Unless you request a hearing within this ten-day period, you will have waived your right to a hearing.

No specific request for a hearing was received from appellant, and the case was adjudicated on the record. In the initial decision, the presiding official found that the agency had supported, by a preponderance of the evidence, its reasons for removing appellant, and affirmed the removal action.

Appellant, in his petition for review, alleged that he was not properly notified of his right to appeal the removal action; that a hearing should have been held on his appeal, and that the punishment was excessive.

With regard to appeals, 5 U.S.C. 7701(a) provides as follows:

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—
>
> (1) to a hearing for which a transcript will be kept; and
>
> (2) to be represented by an attorney or other representative.

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> Appeals shall be processed in accordance with regulations prescribed by the Board.

The Board views appellant's statement in his appeal that he was prepared to present his evidence orally as an indication of his anticipation of a hearing. The phrase in the acknowledgement from the Field Office stating "(I)f you did not request a hearing in your petition for appeal, you may amend you petition . . ." is ambiguous in that it did not clearly indicate to appellant that a further request was necessary. Failure to definitively ascertain whether a hearing was desired effectively denied appellant his right to a hearing.

Thus, the Board finds that the adjudication on the record was erroneous, and hereby grants the petition for review. The initial decision in this case is VACATED and the case is REMANDED to the Atlanta Field Office for the purpose of conducting a hearing, and, issuing a new initial decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 27, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT F. WALSH
v.
GENERAL SERVICES ADMINISTRATION

Docket No.
PH07528010022

OPINION AND ORDER

Appellant was summarily removed from his position as Personnel Staffing Specialist. Contending that he was entitled to the protections afforded by Chapter 75, Title 5, United States Code, he appealed to the Board's Philadelphia Field Office and to the United States District Court for the Eastern District of Pennsylvania. That court required appellant to exhaust his administrative remedy with the Board before seeking court review. *Walsh v. Lee*, Civil Action No. 80-0865 (E.D. Pa., June 2, 1980). The Boart's presiding official then dismissed his appeal for lack of jurisdiction, as he found that appellant was a reemployed annuitant who, according to statute, serves "at the will of the appointing officer." 5 U.S.C. 3323(b). Appellant has petitioned for Board review of the presiding official's jurisdiction determination. Accordingly, the petition for review is GRANTED.

Appellant essentially argued that the manner in which the agency completed pertinent official documents led him to believe that he had been afforded competitive status.[1] He asserted that the agency's general conduct was inconsistent with their claim that he was not entitled to the protections of 5 U.S.C. 7513; further, he claimed that the agency's representations and conduct raised a reasonable expectation of continued employment.

Clarity may best be served at the outset by resort to several pertinent definitions. First, the term "competitive service" as used in Block 28 of the SF-50 refers to positions rather than to individuals. 5 C.F.R. 212.101. An individual, however, may acquire "competitive status," which is described at 5 C.F.R. 212.301:

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[1] In that regard, he placed great significance upon Blocks 28 and 30 of his SF-50 form, Notification of Personnel Action. As completed by the agency, those blocks indicate that appellant occupied a position which was in the competitive service and that his probationary period and service counting toward career tenure had been completed. He also cited the fact that the letter notifying him of his selection made no mention of his status as a reemployed annuitant, as well as the fact that the agency took pains to spell out its reasons for his removal in some detail.

> In this chapter, competitive status means an individual's basic eligibility for noncompetitive assignment to a competitive position. Competitive status is acquired by completion of a probationary period under a career-conditional or career appointment or under a career executive assignment following open competitive examination, or by statute, Executive Order, or the Civil Service rules, without open competitive examination. An individual with competitive status may be, without open competitive examination, reinstated, transferred, promoted, reassigned, or demoted, subject to conditions prescribed by the Civil Service rules and regulations.

5 C.F.R. 212.401 describes the effect of competitive status on the position and provides, *inter alia*, that

> (a) An employee is in the competitive service when he has competitive status and is in a competitive position under a nontemporary appointment.

"Competitive position" means a position in the competitive service as defined at 5 C.F.R. 212.101.

Appellant, who had acquired competitive status prior to his retirement and who was appointed to a position in the competitive service, would appear to meet the definition of an "employee" as defined at 5 U.S.C. 7511(a)(1), and thus be entitled to the protections afforded by section 7513. However, section 7511 must be considered in conjunction with other pertinent statutory and regulatory provisions.

The SF-50 form identifies the nature of the personnel action at issue as "Reinst-Career Reempl Ann."

"Reinstatement"

> means the *noncompetitive* reemployment for service as a career or career-conditional employee of a person *formerly employed in the competitive service who had a competitive status* or was serving probation when he was separated from the service. 5 C.F.R. 210.102(b)(15). (Emphasis supplied.)

A "reemployed annuitant"

> means an employee whose annuity under subchapter III of chapter 83 of title 5, United States Code, was continued on reemployment in an appointive position on or after October 1, 1956. 5 C.F.R. 210.102(b)(13).

"Annuitant" means a *former* employee. . . ." 5 U.S.C. 8331(9). (Emphasis supplied.)

Based on our consideration of the above statutes, regulations, and definitions, as well as the cases dealing with reemployment of annuitants which were cited by the court,[3] we find that the position of a reemployed annuitant such as appellant may properly be explained as follows.

An annuitant who has acquired competitive status before his retirement can return to federal service in one of two ways. He may do so as appellant did, by retaining his annuity (with appropriate salary adjustment) and accepting noncompetitive reinstatement. In accepting such an appointment, the reemployed annuitant serves at the will of the appointing party. 5 U.S.C. 3323(b). Alternatively, he may elect to forfeit his annuity and compete for the position, by open examination if that is required. In the latter instance, his previously acquired competitive status would entitle him to the benefits afforded by 5 U.S.C. 7513. The acquisition of the status "annuitant" does not permanently negate a former employee's competitive status; however, the statutory scheme does not allow for an employee's deriving benefits from his reemployed annuitant status and his competitive status at the same time. This is reflected in 5 C.F.R. 752.401(c)(11), which codifies the exclusion of reemployed annuitants from the coverage of chapter 75.

That section 3323(b) confers a benefit upon an annuitant may not be readily apparent; in fact, however, the statute expanded annuitants' previously restricted opportunities for federal employment. Section 3323(b) derives from the Federal Executive Pay Act of 1956, Pub. L. 854, Title IV, section 13(b), July 31, 1956, 70 Stat. 757. Its effective date was October 1, 1956. Prior law is contrasted with the change in S. Rep. No. 2642, 84th Cong., 2nd Sess. (1956), *reprinted in* (1956) U.S. Code Cong. and Ad. News 3725, 3736:

> Present law provides that no annuitant may be reappointed to any Government position after attaining age 60 unless the appointing authority determines that he has special qualifications.
>
> Section 13(a) provides that annuitants may be reemployed in any position for which they may be qualified and serve at the will of the appointing officer.

The criterion "age 60" is no longer used to describe the group affected. At the time the new law was enacted, persons aged 60 and over were the only retirees barred by statute from federal employment. (Section 2(b) of the Civil Service Retirement Act as in effect on October 1, 1956.) In granting *all* annuitants (rather than just specially qualified ones) an opportunity for federal employment, Congress expressly limited enjoyment of that opportunity to the "will of the appointing officer" concerned.

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[3] *Issarescu v. Cleland*, 465 F.Supp. 657, 659 (D. R.I. 1979) (noting that reemployed annuitants are employed on a temporary and discretionary basis); *Weisbrod v. Lynn*, 494 F.2d 1101, 1102 n.1 (D.C. Cir. 1974) (mentioning a possible loss of procedural protections when an employee becomes a reemployed annuitant).

Appellant claimed that the agency's conduct created a reasonable expectation of continued employment which the agency could not then abrogate without due process of law. The Supreme Court has held that

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents v. Roth*, 408 U.S. 564, 578 (1979).

In *Perry v. Sindermann*, 408 U.S. 593, 601 (1979) the Supreme Court added that:

> [a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Where a substantive right or entitlement is found, it may not be viewed wholly apart from the procedure provided for its enforcement. *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974).

5 U.S.C. 3323(b) does not confer a *right* to federal employment; it merely removed bars to the *opportunity* for it. As such, it provides for no procedural protections; rather, appointment and termination are at the will of the appointing officer. We find that the SF-50 form was correctly prepared so as to indicate that appellant was an annuitant who had previously acquired competitive status, but who was receiving appointment subject to the terms of section 3323(b). In this regard, we note that the words "[e]mployee serves at the will of the appointing officer" were typed onto the form.

The Board's jurisdiction is limited to "any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a). The presiding official correctly determined that no law, rule, or regulation affords a reemployed annuitant the right to appeal an adverse action to the Board. Assuming, *arguendo*, that the agency's representations did give rise to expectations which are entitled to due process protections, such a claim does not, in and of itself, confer jurisdiction in the Board.

Accordingly, the initial decision is AFFIRMED. This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 27, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

OSCAR L. BOWERS
v.
U.S. POSTAL SERVICE

Docket No.
AT075209258

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the initial decision issued July 22, 1980.

Appellant was removed from his position for reporting to work in a condition unsuitable to perform his duties and for failure to meet the attendance requirements of his position. On appeal to the Board, the agency produced five witnesses who testified that appellant was intoxicated on February 19, 1980, and met its burden of proof on the second charge. Therefore, the presiding official affirmed the agency action.

In appellant's petition for review, he alleges that on June 17, 1980, the day after the hearing, appellant's representative, Mark J. Peters, learned of an abortive attempt by the agency representative, Jerry G. Selmon, to secure an additional witness, Ivory P. Myers. On June 18, 1980, Peters wrote the presiding official alleging that Selmon used intimidation in this abortive attempt and stating that Peters was in the process of obtaining an affidavit from Myers.

On June 24, 1980, Peters submitted an affidavit from Myers stating that Selmon had called Myers at home, had asked him if appellant was intoxicated on the night in question, and when Myers said "I don't know," the following exchange occurred:

> [Selmon] asked me if Oscar's eyes were glassy, I said—"if they were, I didn't notice." He asked me if Oscar was unsteady on his feet, and I said, "No." He asked me if I smelled alcohol, and I said, "Yes." He asked me if it could have been beer or liquor, and I said, "I didn't know." He said, "Well then he was intoxicated." I said, "I don't know."

Myers further stated that Selmon asked this series of questions four times, each time raising his voice slightly. He then questioned Myers about his attendance, stating that Selmon would "personally" ask Myers' supervisor to "look into" his sick leave and threatened to send Myers to an agency physician to determine if Myers was "fit to work here."

Appellant contended that this affidavit reflected on the credibility of all of the agency witnesses. However, the presiding official declined to exercise his discretion under 5 C.F.R. 1201.57(c) to accept and consider this new evidence.

Selmon, as agency representative, has responded to the petition for review, submitting a memorandum relating his account of the telephone conversation. According to the memorandum, Selmon called Myers at home, discussed the Bowers situation and asked Myers, who had been taking sick leave, the nature of his illness. Selmon asked Myers "if he had ever been disciplined for use of sick leave before," and told Myers that Selmon would ask Myers' supervisor "to review his attendance record and make a determination whether discipline was appropriate or a fitness for duty exam, etc." The memorandum continues, "I can readily see where Mr. Myers might have concluded that my discussion with him concerning his attendance immediately following my discussion with him about his knowledge of the Bowers incident could have been interpreted by him to be coercion to testify, etc.

Selmon characterizes this incident as a case of bad judgment on his part. In resolution of a grievance brought by Myers concerning this incident, a "step 2" decision was issued on July 28, 1980, agreeing with this characterization.

5 C.F.R. 1201.57(c) provides for the acceptance of new evidence into the record "upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." Evidence that an agency representative had built a case out of coerced, perjured testimony would, of course, be material. The appellant has alleged in letters to the presiding official dated June 18 and June 24, 1980, and in his petition for review that the Myers affidavit casts doubt on the credibility of all of the agency witnesses. We find that the presiding official's failure to consider this evidence and its impact on the credibility of the agency witnesses was in error.

It has been held that "when public officers connive at or knowingly acquiesce in the use of perjured evidence, their misconduct denies a defendant due process of law." *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975) *cert. denied*, 423 U.S. 933, and cases cited therein. While Myers did not testify at the appellant's hearing, appellant has alleged the credibility of all of the agency witnesses to be impaired. In the interest of preserving the integrity of the appeals process, appellant's contention should be addressed. While the agency's error may have been harmless, the Board stated in *Parker v. Defense Logistics Agency*, 1 MSPB 489, 493 (1980) that "caution must be exercised in applying the harmful error doctrine where basic rights to procedural due process are implicated." *See also Doe v. Hampton*, 566 F.2d 265, 277-78, n. 29 (D.C. Cir. 1977).

Petitioner has submitted new and material evidence. 5 C.F.R. 1201.115(a). Accordingly, the petition for review is GRANTED, the initial decision is REVERSED, and the case is REMANDED to the Atlanta Field Office for a determination as to whether the field office adjudication was tainted by misconduct on the part of the agency representative.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL DAVIES v. DEPARTMENT OF THE NAVY	Docket No. SF075209070

OPINION AND ORDER

By petition for review, the appellant has requested the reopening of the initial decision of the San Francisco Field Office which sustained the agency's action in removing the appellant for failure to meet a condition of employment; specifically, his failure of two courses of instructions in the same year. The initial decision found that the appellant had failed to meet this condition of employment, and found the appellant's contentions of harmful error to be irrelevant. In his petition for review the appellant argued that the decision of the presiding official was based on an erroneous interpretation of statute and regulation.

The issues in this case concern the agency's apprentice program, and its procedures for dealing with apprentices who received failing grades in various classes given. The agency had promulgated a regulation which provided in pertinent part that an apprentice who received two unsatisfactory grades in any subject during an apprentice year would be dropped from training and adverse action to remove the apprentice would be initiated. There was no dispute at any stage of the proceedings that the appellant had received two unsatisfactory grades.

However, the regulation also required that certain procedures be followed before a failing grade became final.

> Unsatisfactory Progress
>
> Whenever it is judged that an apprentice's performance in either an area of work experience or any related subject could become unsatisfactory, the apprentice will be notified in writing with a *"warning of unsatisfactory progress."* The Apprentice Program Administrator will offer and make arrangements to help the apprentice to succeed.
>
> Make-up of Unsatisfactory Grade
>
> If an apprentice receives a warning letter of an unsatisfactory grade in a related subject, the apprentice will be given the opportunity to enroll in a study laboratory. This study program will be offered prior to the final examinations, four afternoons per week, from 1630-1830 Monday-Thursday.

> If the apprentice still fails the examination, he will be given the opportunity to continue in the study laboratory to prepare for the make-up final examination which will be scheduled within approximately four weeks. If the make-up examination is failed, then the apprentice is returned to the shop and will re-enroll in the same subject.
>
> If the apprentice fails the second time after re-enrolling in the same subject and he also fails the make-up examination in that subject, then two unsatisfactory marks would have been obtained and, according to the CMMI 410-G, the apprentice will be dropped from the program as a condition of the employment agreement.
>
> Spring Semester
>
> If the apprentice receives a warning of an unsatisfactory grade in the second semester, the apprentice will have the same opportunity to study prior to the final examination and four weeks after the final examination if needed as before, if the apprentice fails the subject twice, and has received assistance prior to each appraisal, the apprentice will be dropped from the program.

Navy Shipyard Bulletin No. 12400.2 (Apprentice Program Handbook) at 14-15.[1]

It is admitted that appellant received two failing grades in Trade Theory within the same apprenticeship year. However, the record indicates a genuine question of fact as to whether the appellant was given the opportunity to participate in a study program as required by procedures established in the Apprentice Program Handbook. The Board's regulation, 5 C.F.R. 1201.56(b), requires that the Board overturn agency action if the appellant "shows harmful error in the application of the agency's procedures in arriving at such decision."

The first issue is whether the Navy actually failed to follow its own procedures. The Navy offered into evidence an affidavit of Commander Lawrence J. Smith dated November 21, 1979, which stated that he had met with the appellant on August 10, 1979, that appellant admitted that academic assistance had been made available to him, and that he had refused that help. The file also contains a memorandum written for the record by Commander Smith on August 10, 1979, stating that on that date he had met with Mr. Davies, and Mr. Davies indicated that academic assistance was made available to him but that he chose not to take advantage of it.

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[1] Although later rescinded or superseded, this was in effect for all relevant times in issue.

Mr. Ireland, the Apprentice Program Administrator, testified that special training was offered to the appellant. Furthermore the file contains memos from Mr. Ireland to the appellant dated May 7, 1979, and June 8, 1979 offering the appellant an opportunity to take the make-up exam, and stating that Ireland was available to discuss appellant's classroom work with him. There is no indication in the record that appellant had been sent a warning of unsatisfactory progress prior to the initial examination date in either semester, or that any help had been offered at that time.

The appellant denied at the hearing that he was given the opportunity to enroll in a study laboratory or that any additional training was offered. Mr. Apodoca, another apprentice, testified that their trade instructor, Mr. Shepard, offered no special assistance, and in fact told the students to obtain their own instruction. Mr. Ireland testified that no study laboratory was ever offered to the appellant. Finally, Charles Johnson, who represented appellant at the August 10 meeting with Commander Smith, testified that Commander Smith never discussed the availability of retraining.

It is thus unclear from the record whether or not the Navy actually made special assistance available to the appellant as required by the Apprentice Program Handbook. The presiding official failed to resolve this issue; instead, he simply stated, "I find that any deficiencies in the 'study lab' or remedial education programs are irrelevant and do not provide a successful affirmative defense in the instant case." Initial decision at 3. In failing to even consider whether the agency followed its own procedures, the presiding official quite clearly misinterpreted 5 C.F.R. 1201.56(b).

Assuming that an error was committed, however, before a remand can be ordered it is also necessary to determine whether the Navy's failure to provide a study laboratory would constitute a harmful error as required by 5 U.S.C. 7701(c)(2)(A) and 5 C.F.R. 1201.56(b). In *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980) the Board analyzed what constitutes a harmful error. The Board found that the requirement that an error be harmful was included to avoid reversal of agency actions due to procedural technicalities. *Parker*, 492. *See also*, S. Rep. No. 95-969, 95th Cong., 2d Sess. 51, 54 (1978). Therefore, the Board ruled that it must be likely that the alleged error would affect the result, and that the probable effect of the error must be determined in light of all the circumstances of a particular case. The Board has defined harmful error as, "Error by the agency in the application of its procedures, which in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one rendered." 5 C.F.R. 1201.56(c)(3).

At issue then in the current case is whether the Navy's provision of a study laboratory would have likely affected appellant's performance in the training course. Of course, had he passed the course, no removal action would have been taken against him. "Although the inquiry is necessarily one addressed to the imponderables of what might have been," *Parker,* 492, it is hard to imagine a situation more likely to cause harm to the employee. The mere fact that the Navy established a remedial study program is indicative of its belief that the program would likely contribute to an apprentice's ability to pass the program. Therefore, it seems certain that if the Navy failed to provide appellant with any opportunity for special study, harmful error occurred.

It should also be noted that the nature of the error made by the Navy is relevant to the issue of harm. In its response to the petition for review, the Navy admitted that it did commit a technical error by not offering a "study laboratory." However, it asserted that the study opportunities it made available to the appellant were adequate to satisfy the purposes of the study laboratory, and that the failure to actually provide a study laboratory was harmless error. It would seem that if study opportunities were actually made available to the appellant, then the failure to provide a "laboratory" would constitute the very sort of technical error which should not be the basis for reversal. The important question is simply whether the appellant was given the chance for remedial study. However, the record reflects a genuine controversy as to whether any study opportunities were offered to the appellant and the presiding official failed to resolve this controversy. If the appellant was afforded the opportunity but declined it as the agency alleged, then the agency has not committed any harmful error and the removal action would be proper. Thus the resolution of this matter is crucial to this case.

In view of the clearly conflicting testimony of the witnesses, and the fact that the presiding official was present to observe their demeanor, and thus best judge their credibility, this case is remanded to the presiding official for the purpose of making a determination of whether appellant has proven that no special study opportunities were offered. If such an error is found upon remand, the decision of the agency should be reversed, and the appellant should be reinstated with the opportunity to re-enroll in a study laboratory, or similar remedial study.

The petition for review is thus accordingly GRANTED, the case is REOPENED. The initial decision is REVERSED, and is

REMANDED to the presiding official for further proceedings consistent with this opinion.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *October 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Edwardo R. Gonzales v. **United States Postal Service**	Docket No. DA075209222

Opinion and Order

Appellant filed an appeal with the Board's Dallas Field Office alleging that his fourteen (14) day suspension was taken against him due to discrimination on the basis of physical handicap.

The presiding official, citing *Wren v. Department of the Army*, 2 MSPB 174 (1980), correctly held that the Board had no jurisdiction to consider appellant's allegations of discrimination, a prohibited personnel practice, because appellant had no right of appeal before the Board from a fourteen (14) day suspension. In *Wren*, we noted that before the Board may consider any allegation of prohibited personnel action as an affirmative defense under 5 U.S.C. 7701, the personnel action which is the subject of the appeal must be brought within the Board's appellate jurisdiction under some law, rule, or regulation.

We note, however, that procedures do exist whereby such an allegation may be investigated by the Special Counsel in the absence of an otherwise appealable action. *See* 5 U.S.C. 1206 (a)(1); 5 C.F.R. 1251.101 *et seq*. Consequently, in this case as in other nonappealable cases involving such allegations, we are herewith referring petitioner's allegations to the Acting Special Counsel for such action as she may find appropriate.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

Ersa H. Poston.

Washington, D.C., *October 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HAROLD PIPER
v.
DEPARTMENT OF JUSTICE

Docket No.
PH075209032

OPINION AND ORDER

The issue before the Board in this appeal is whether attorney fees were properly awarded under 5 U.S.C. 7701(g)(1) against the Department of Justice by the Board's Philadelphia Field Office upon reversing the removal of Harold Piper. The Office of Personnel Management (OPM) has petitioned for review of the award, urging that it was erroneously based on the presiding official's finding that the action "ought not to have been taken."

Mr. Piper, the appellant, was removed from the position of Correctional Officer with the Bureau of Prisons of the Department of Justice, the agency, based on charges of "disgraceful conduct and conduct unbecoming a Federal Correctional Officer." The charges were founded on the allegations that the appellant associated with a fellow employee whom he had observed receive and open a package containing a substantial quantity of marijuana plus $200 in cash, and that the appellant "failed to take any positive action" thereafter.

In his initial decision on the appeal, the presiding official considered the appellant's denial of any awareness of the packages' contents, as well as the fellow employee's contradictory statements concerning his knowledge of the appellant's awareness, and found that the preponderance of the evidence did not support the conclusion that the appellant knew what the package contained. The presiding official held, accordingly, that the appellant's association with his fellow worker and his failure "to take positive action" with respect to the contents of the package did not constitute actionable offenses supporting removal.

In his addendum decision on the appellant's subsequent motion for an award of attorney fees under 5 U.S.C. 7701(g)(1), the presiding official set forth his concise findings:

> Here, the appellant was the prevailing party when the agency's action was determined to have been not for such cause as will promote the efficiency of the service. Although it cannot also be determined to what extent the appellant

> has otherwise been harmed by the agency's action, I find, in the interests of justice, that he should not have to bear responsibility for such reasonable attorney fees as were incurred in appealing an action which ought not to have been taken.

Addendum Decision at 1. OPM argued in its petition that this conclusion erroneously applies the statutory example of an award's being warranted in the interest of justice when the agency's action was "clearly without merit."

We find, however, that reasonable fees were properly awarded in this appeal because the agency official who decided upon the appellant's removal knew or should have known that the agency could not prevail on the merits of the charges. *See Allen v. U.S. Postal Service,* 2 MSPB 582, 589 (1980). The record on appeal discloses that the charges against the appellant were based on contradictory statements by the appellant's co-worker who was arrested for unlawful possession of marijuana—one statement indicating that the appellant saw him opening the package containing marijuana and another saying that he was not sure whether the appellant knew what was in the package. The appellant himself had denied such knowledge in his response to the removal proposal, and the agency introduced no evidence to show that the denial, though self-serving, was not truthful. We agree, therefore, with the presiding official's finding that the deciding agency official should have realized that the agency lacked sufficient evidence to sustain its charges, and decided against removal.

After properly concluding that an award of fees was warranted in this appeal, the presiding official considered the reasonableness of the fees claimed:

> I have reviewed the entire record in this case, including the petition for attorney fees and explanatory material relating thereto. I find that the interests of justice warrant payment by the agency of the appellant's attorney fees in the amount of $900.00. I have concluded that this amount is reasonable in light of the time and labor reasonably required and expended by the attorney; the novelty of the issues raised in this case; the skill required of the attorney to properly perform the legal services; the attorney's experience in such matters; the customary nature of the hourly fees charged; and the results obtained in this case.

Addendum Decision at 1. This conclusory finding lacks an explanation of how the various factors listed were evaluated by the presiding official, as required under *Kling v. Department of Justice,* 2 MSPB 620, 625 n. 6 (1980). However, our review of the submission of the appellant's attorney in connection with his motion for fees leads us to conclude that $50.00 is a reasonable hourly rate for such an able Philadelphia practitioner, and 18 hours is a reasonable amount of time for him to spend interviewing the appellant, researching and preparing for the hearing, and attending the hearing at the Lewisburg Penitentiary. Thus, since we find that $900.00 is a reasonable attorney fee to be awarded in this case, nothing would be gained by remanding the appeal to the Field Office for further explication of the presiding official's reasonableness determination.

Accordingly, the petition for review is hereby DENIED. The agency is ORDERED to furnish the Philadelphia Field Office with a certified statement that $900.00 has been remitted to the appellant's attorney, Ben W. Joseph, within ten (10) calendar days of receipt of this decision.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Miran Buganski
v.
Department of Health, Education, and Welfare

Docket No. NY531D09004

Opinion and Order

Appellant has petitioned for review of the initial decision issued on November 9, 1979, affirming the agency's denial of a within-grade increase. The Board has fully considered the petition for review and finds that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115. Thus, the petition is hereby DENIED.

The presiding official, however, held that the agency was required to prove its charges by a preponderance of the evidence. Subsequent to the date of the initial decision, the Board held that the applicable standard of proof in denial of within-grade increase cases is substantial evidence.[1] Accordingly, this case is REOPENED on our own motion.

The substantial evidence standard is a lesser burden than that of preponderance of the evidence.[2] The presiding official having held that the agency proved its charges by a preponderance of the evidence, and there being adequate support for such conclusion in the record, there is no question that the agency met the substantial evidence burden. Thus, the presiding official's error had no effect on her ultimate decision and therefore was harmless.

Accordingly, the initial decision is AFFIRMED as modified by this opinion.

For the Board:

Robert E. Taylor,
Secretary.

Washington, D.C., *October 31, 1980*

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[1] *William E. Parker v. Defense Logistic Agency*, 1 MSPB 489 (1980).

[2] Section 1201.56(c) of the Board's regulations defines substantial evidence and preponderance of the evidence as follows:

> (1) *Substantial evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.
>
> (2) *Preponderance of the evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES S. PERKINS v. VETERANS ADMINISTRATION	Docket No. PH075209149

OPINION AND ORDER

The initial decision of the presiding official in the above-styled case is hereby REOPENED and AFFIRMED as MODIFIED.

The appellant was removed for violating an agency regulation prohibiting "disrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel." The presiding official concluded that the agency had failed to prove its charges by a preponderance of the evidence and therefore he reversed the agency action. Except as noted below, the agency's petition for review merely states its disagreement with the credibility determinations and factual findings of the presiding official. This is not sufficient to trigger a complete review of the record on appeal. *See Barber v. Army,* 3 MSPB 41 (1980).

The appellant had filed an earlier petition of appeal, raising the issue of discrimination. That petition was dismissed without prejudice as untimely because of his previous filing of a discrimination complaint with the agency (MSPB Docket No. PH075299105). The appellant renewed his discrimination allegation in the instant appeal. In his initial decision the presiding official noted that the allegation of discrimination had been pending for more than 120 days with the agency and that no agency decision had issued. However, he failed to address the issue and make findings thereon.

In its petition for review the agency argued that the presiding official erred in failing to rule on the issue of discrimination. We agree.

Appellant's claim of discrimination constitutes both an allegation of prohibited personnel practice under 5 U.S.C. Section 2302(b)(1) and an allegation of a violation of EEO laws. 29 C.F.R. 1613.202 (1979). To establish a violation of these authorities, the appellant must demonstrate that he was engaged in activitiy protected by the appropriate section, that he was subsequently treated in adverse fashion by the employer, and that there is a causal connection between the protected activity and the adverse action. The presiding official did not analyze appellant's appeal as set forth above, nor did he make any findings appropriate to the analysis.

Whenever an appeal raises issues of discrimination under 5 U.S.C. 7702, as in the instant appeal, an appellant is entitled to be advised of his/her rights under 5 U.S.C. 7702(b)(1) to petition the Equal Employment Opportunity Commission to consider the Board's decision and his/her right under 42 U.S.C. 2000e-16 to a trial *de novo* in United States District Court on the discrimination issues. Appellant was not so advised. *See Prince v. Navy*, 3 MSPB 113 (1980).

The Board has carefully considered the record in this case with respect to the issue of race discrimination raised by the appellant in his petition of appeal. The appellant presented no evidence in support of his allegation, and none is revealed by the record. Therefore, we find that he has failed to meet his burden under 5 C.F.R. 1201.56(b), and that part of his appeal alleging discrimination is hereby DISMISSED. The initial decision is MODIFIED to reflect such dismissal.

Accordingly, this case is REOPENED, and upon reopening, the Board AFFIRMS AS MODIFIED the initial decision.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision as modified herein to the Field Office within ten (10) days of the date of this Order.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this Order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this Order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 31, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM E. SUMMERS v. DEPARTMENT OF THE TREASURY	Docket No. DE035199004

OPINION AND ORDER

The appellant was separated through reduction in force from the position of Assistant Superintendent, Coining Division, Denver, Colorado. He appealed to the Board's Denver Field Office. The presiding official issued his initial decision sustaining the agency action. The appellant petitioned for review contending that the presiding official misinterpreted law and regulation because he did not find that 5 C.F.R. 351.201(b) (1979), which provides that agencies are not required to fill vacancies during a reduction in force, has been "superseded" by 5 U.S.C. 2301(b)(5) which provides in pertinent part that, "the Federal work force should be used efficiently and effectively." The appellant argued that this section supersedes the regulation and has the effect of requiring the filling of vacancies during a reduction in force.

On appeal, the appellant argued that there was at least one, and possibly two vacancies for which he was qualified and which he should have been offered, as opposed to the WG-5 position he was offered. The presiding official did not find 5 U.S.C. 2301(b)(5) as mandating that agencies fill vacancies. The Board finds no error in this regard.[1] There has been no showing that the agency failed to comply with the applicable reduction in force procedures.

Accordingly, we find the decision by the presiding official to be proper, and DENY the petition for review.

This is the final order of the Merit Systems Protection Board. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

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[1] We have previously noted that the "merit system principles" set forth in § 2301(b) are not self-executing. *Wells v. Harris*, 1 MSPB 199 (1979) at note 11 of Part II.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 1, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

PAUL E. CARDIN
v.
DEPARTMENT OF THE NAVY

Docket No.
BN035109005

OPINION AND ORDER

Appellant petitioned the Board for review of the initial decision which dismissed without prejudice his petition for appeal on the ground that it was prematurely filed. Based on 5 C.F.R. 1201.22 (b), the presiding official found that "the matter sought to be appealed is not ripe for adjudication."

Appellant contends in the petition for review that the presiding official misinterpreted the facts, and that the above finding was based on an erroneous interpretation of the law and regulations. The petition is hereby granted.

Appellant received a specific reduction-in-force (RIF) notice dated December 3, 1979.[1] The notice informed appellant that his position was being abolished effective February 4, 1980, offered him a lower grade position with retained grade and pay, and advised him of appeal rights to the Merit Systems Protection Board as follows: "You may appeal at any time after receipt of this notice, but no later than 20 calendar days after the effective date of the action. . . ."[2]

Accordingly, appellant filed a petition for appeal with the Boston Field Office of the Board, dated December 27, 1979, alleging that the agency was using RIF procedures to accomplish a downward reclassification of his position in violation of regulations,[3] and in the alternative, that if the action was a valid RIF, RIF procedures were not being followed relative to assignment rights.

On January 21, 1980, appellant filed an amendment to the petition for appeal alleging improper actions by the agency since the filing of the original petition. Included were allegations that (1) the agency removed him from three position registers on which he had been rated highly qualified, and that (2) as a result of the rescission of his eligible ratings, a position for which he formerly had been determined to be highly qualified was now held by an employee with a lower retention standing than himself.

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[1] According to appellant's answer to question number 8 on the Board's appeal form appellant did not receive a prior written general notice of the RIF action.

[2] The agency's statement that an appeal could be filed anytime after receipt of the specific RIF notice was incorrect. Under 5 C.F.R. 1201.22(b), a petition for appeal may be filed within 20 days *after* the effective date of the action, which according to the notice was to be February 3, 1980.

[3] Appellant cited the Federal Personnel Manual, Chapter 351.

In a letter dated January 14, 1980, in response to the amendment to the petition for appeal, the agency stated that the effective date of the RIF had been changed to September 30, 1980, due to unanticipated workload requirements. The agency also stated that "Mr. Cardin was reached in the RIF because all Wood Craftsmen were affected; because Mr. Cardin is a IB, *he was therefore displaced by a IA employee* who qualified for his position." (emphasis supplied).

Based on the agency's letter, the presiding official sent appellant a letter requesting him to show cause why his appeal should not be dismissed as being prematurely filed since the effective date of the RIF had been changed to September 30, 1980.

In a February 7, 1980 response to the show cause letter, appellant noted that the effective date of the RIF had been changed to September 30, 1980, but stated that he had been removed from his permanent position, effective February 3, 1980, and placed in a temporary position with a not-to-exceed date of September 30, 1980.[4]

Based on the record, it appears that appellant's petition for appeal properly could have been dismissed as being prematurely filed at any time prior to the exchange of letters between the presiding official and the parties following the filing of the amendment to the petition for appeal. However, appellant's allegation that he was removed from this permanent position, effective February 3, 1980, may involve an action within the meaning of 5 C.F.R. 351.901, 5 C.F.R. 1201.22(b), or 5 U.S.C. 7512, which would require the Board to retain jurisdiction in this case.

Where there is any significance in the agency's use of the past tense in stating that "Mr. Cardin was . . . displaced" and appellant's allegation that he had been removed from his permanent position cannot be determined from the evidence of record.

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[4] Appellant restated this claim in his petition for review noting that an "adverse action" was taken against him on February 3, 1980, as follows: "Mr. Erin Whitten displaced me from the permanent position of Planner and Estimator Wood Craftsman. I was placed in a . . . position (temporary not to exceed 9/30/80) . . . and affected by the reduction-in-force action." The substance of the allegation is that a Chapter 75 (Title 5, U.S. Code) adverse action was taken against him based on the specific RIF notice of December 3, 1979, and that he was affected by the RIF as of February 3, 1980, within the meaning of 5 C.F.R. 351.901.

However, we find that at the time the initial decision was issued, there was sufficient evidence in the record to raise a question whether an appealable action had occurred. Although appellant has the burden of proof on the issue of jurisdiction, his submission was sufficient to require the agency to come forward with evidence concerning the matter he asserted. Therefore, we VACATE the initial decision and REMAND this appeal with instructions to the presiding official to (1) reopen the record for submission of additional evidence by both parties, (2) determine whether an action occurred within the meaning of 5 C.F.R. 351.901, 5 C.F.R. 1201.22(b), or 5 U.S.C. 7512, prior to the date of the initial decision, and (3) issue a new decision in this case.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSEPH A. LIGUORI
v.
UNITED STATES MILITARY ACADEMY

Docket No.
NY035180002

ORDER

This case is before the Board on remand from the United States District Court for the Southern District of New York, by order dated October 1, 1980.

Appellant was employed as Superintendent of the Cadet Mess (WS-15) at the United States Military Academy, West Point, New York, from January, 1975, until March 9, 1977, when he was advised that his position would be abolished, effective May 15, 1977, as a result of a reduction-in-force incident to a reorganization of the Cadet Mess. The Academy advised appellant that, according to its retention register and its review of his qualifications for reassignment, the Academy's best offer of continuing employment in lieu of separation was the position of Cook General Foreman, WS-11. Appellant accepted the Cook General Foreman position under protest.

On March 15, 1977, appellant filed an appeal of the reduction-in-force and his resulting reduction in grade with the New York Field Office of the Federal Employee Appeals Authority of the former Civil Service Commission. Appellant contended that the reduction-in-force was engineered by certain officials of the Academy as a subterfuge to conceal its demotion of him due to malice toward him and in retaliation for changes he had made in the Cadet Mess since his arrival.

Upon review of the appeal, the presiding official determined, by decision dated October 13, 1977, that there was no violation of appellant's rights under the reduction-in-force and that his change to a lower grade was in compliance with the applicable regulations governing such actions. He further found that appellant had not challenged the bona fides of the reduction-in-force. Accordingly, the presiding official affirmed the Academy's reduction-in-force action.

Thereafter, on November 3, 1978, upon appellant's request dated June 19, 1978, for reopening and reconsideration of the FEAA decision, the Appeals Review Board of the former Commission denied appellant's request on the ground that it was untimely filed.

Consequently, on January 31, 1979, appellant filed suit against the former Civil Service Commission and other defendants in the United States District Court for the Southern District of New York to seek, *inter alia*, review of the FEAA and ARB determinations. On October 1, 1980, the court granted defendants' motion to remand the case to the Board for further administrative review of the FEAA and ARB determinations.

Reduction-in-force procedures are to be applied only for reasons that are nonpersonal to the employee or employees affected. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972). A reduction-in-force cannot be used to remove or demote an employee for reasons personal to the employee without the application of adverse action procedures. Thus, an appellant's allegation that a reduction-in-force was in reality a subterfuge to conceal his demotion goes directly to the question of the bona fides of the reduction-in-force when the allegation is supported by a showing that the action may have been based upon an improper motive. That question will be reviewed on appeal of the reduction-in-force, and the appellant has the burden of making such a showing. *See Keener v. United States*, 165 Ct. Cl. 334 (1964); *Daub v. United States*, 223 F. Supp. 609 (E.D. N.Y. 1963).

We find upon review that the presiding official erred in finding that appellant did not contest the bona fides of the reorganization. The administrative record clearly shows that appellant challenged the good faith of Academy management in implementing the reduction-in-force and alleged that the action was directed personally against him. In light of appellant's nonfrivolous allegation that the agency took the reduction-in-force for personal reasons, we find that appellant is entitled to a hearing to determine whether the reduction-in-force was in fact an adverse action under 5 U.S.C. Chapter 75. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972). *See Keener v. United States*, 165 Ct. Cl. 334 (1964).

Accordingly, this appeal is REOPENED, REVERSED AND REMANDED to the New York Field Office for rehearing and reconsideration consistent with the aforementioned order of the United States District Court for the Southern District of New York, and this Order. The Field Office is directed to provide appellant the opportunity for a hearing under the procedures set forth at 5 C.F.R. sec. 772.307 (1977) and provide the parties the opportunity to introduce new evidence. The Field Office further is directed to rehear and reconsider the appeal to determine whether the reduction-in-force was in fact an adverse action against appellant and, if it was, whether the agency applied the appropriate procedures in taking the adverse action. Should the Field Office determine that the reduction-in-force was not an adverse action, it should determine whether reduction-in-force procedures were correctly applied. Inasmuch as appellant received notice of the proposed action before the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, became effective on January 11, 1979, the law and regulations in effect on March 9, 1977, when appellant received notice of the reduction-in-force should govern the proceeding. *See Kyle v. ICC*, 609 F.2d 540 (D.C. Cir. 1979); *Ellis v. MSPB*, 613 F.2d 49 (3d Cir. 1980).

The Field Office is directed further to reconsider the appeal, based on the cumulative record of the Federal Employee Appeals Authority, the Appeals Review Board and the Board, and issue a decision in the matter by December 17, 1980.

For the Board:

ERSA H. POSTON.

November 3, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
MANUEL MUNOZ
AND
HANS M. MARK, SECRETARY
U.S. DEPARTMENT OF THE AIR FORCE

Docket No.
HQ120800016

OPINION AND ORDER

This matter is before the Board on the Acting Special Counsel's request pursuant to 5 U.S.C. sec. 1208(c) for a stay of the removal of Manuel Munoz from his employment at Kelly Air Force Base.[1]

On August 12, 1980, the Acting Special Counsel petitioned for a permanent stay as a sanction for alleged interference with her investigation. Since a stay may be issued only for the purpose of allowing the Acting Special Counsel time to complete her investigation and to seek corrective action,[2] the Board on August 18, 1980, ordered the Acting Special Counsel to report on the status of her investigation and/or her plans to seek corrective action.[3]

When the Acting Special Counsel reported on August 21, 1980, that she had completed her investigation and was preparing an investigative report which would "include any recommendations regarding disciplinary or corrective actions," the Board found that the submission failed to satisfy the requirements of *Kass*.[4] Accordingly, the stay was DENIED on August 28, 1980.

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[1] The request was filed on October 3, 1980, in the form of a motion for reconsideration of the Board's August 28, 1980, Order denying an extension of a previously ordered stay under 5 U.S.C. sec. 1208(c). In an Order dated October 17, 1980, the Board denied that motion and ordered that the motion would instead be treated as a petition for a stay under section 1208(c).

[2] *In the matter of Kass*, 2 MSPB 251, 256 (1980).

[3] The Acting Special Counsel's Motion of October 3, 1980, indicates that she misconstrued the Board's August 18, 1980, Order as a demand for investigative facts. Instead, the Order merely inquired as to the purpose for the stay.

[4] The Board based its findings on the submission's failure to indicate that the Acting Special Counsel anticipated further investigation or a recommendation for corrective action. However, the Acting Special Counsel's October 3rd Motion has satisfied the Board that the preparation of an investigative report is a legitimate purpose for a stay under 5 U.S.C. sec. 1208. In addition,

Subsequent to the Board's October 17th Order, the agency and the Acting Special Counsel have filed submissions (on October 24 and 29, 1980, respectively) on the issue of whether a stay should be granted, and the Board has duly considered these submissions in reaching its conclusion.

As a preliminary matter, the agency has argued that the wording of section 1208(c) ("The Board may extend the period of any stay . . .") requires that there be a pre-existing stay in effect on the date of the issuance of a stay under that section. We disagree. We interpret section 1208(c) to mean that, as a prerequisite to the issuance of a stay under that section, previous stays must have been issued under sections 1208(a) and 1208(b). The fact that a 1208(b) stay lapses prior to the beginning of a 1208(c) stay is not fatal to the 1208(c) petition. As the Board held in *Kass*, 259-262, 265-266, in 5 U.S.C. sec. 1208 Congress created three separate stays, each with its own threshhold of proof. In the absence of contrary indication in the legislative history, the Board therefore considers the use of the term "extend" to require only that requests be made sequentially, *i.e.*, that the Board could not issue a stay under 5 U.S.C. sec. 1208(c) prior to the issuance of stays under sections 1208(a) and (b). The Board does not perceive that it is deprived of authority to issue a stay under section 1208(c) by the expiration of a previous stay.[5] Certainly there may be instances where a lapse of time would be such as to amount to an abuse of prosecutorial discretion. We find no such abuse in this case.

On the merits, the agency has argued that there are no reasonable grounds to believe that the Air Force committed a prohibited personnel practice, because "the Civil Service Reform Act does not insulate an employee from discipline for offenses committed in connection with processing of a complaint of discrimination."[6] We agree that the Reform Act does not protect an employee from discipline for making statements in such a proceeding which he knows to be false.[7] However, even where the agency has stated a legitimate basis for an adverse action, a case under 5 U.S.C. sec. 2302(b) is not precluded. The critical issue is not whether the

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since the Acting Special Counsel has, in the interim, recommended corrective action to the agency, the August 28th Order is not, as the agency argues, res judicata as to the pending request for a stay.

[5] The Board has issued stays despite lapse of time in *In the matter of Frazier*, 1 MSPB 64, 116 (1979), and *In the matter of Tariela*, 1 MSPB (1979).

[6] Opposition to Petition for Stay, filed October 24, 1980, 4.

[7] *Cf.* S. Rep. No. 969, 95th Cong., 2d Sess. 22 (1978).

agency's stated reason was legitimate, but whether the stated charges were truly the basis for Munoz's removal.[8]

Where there is evidence of hidden motivation, the truth of the matter is not likely to be established in a preliminary proceeding such as this.[9] At this stage of the case, where an employee has been removed following an Equal Employment Opportunity (EEO) hearing, where the respondent has admitted previous retaliation against the same employee in an agency EEO decision, where the deciding official has stated that the fact that the falsehood occurred in the context of an EEO proceeding was significant, and where there is evidence of disparate penalties, the allegation that retaliation was a significant factor in the removal is not beyond "the range of rationality." [10] Under the standards set forth in *Frazier* and *Kass*, the Board continues to concur that there are reasonable grounds to believe that the agency action violated 5 U.S.C. sec. 2302(b)(9).[11]

Accordingly, a stay of 21 days is hereby GRANTED. The Board does not contemplate that any further extension of the stay shall be granted unless a request for corrective action pursuant to 5 U.S.C. sec. 1206(c)(1)(B) has been filed with the Board.

The stay shall be in effect from November 4, 1980, through and including November 24, 1980. Any request for an extension of the stay under 5 U.S.C. section 1208(c) shall be filed on or before November 17, 1980. Any response by the agency shall be filed on or before November 20, 1980.

It is further ORDERED that:

(1) All actions of the Department of the Air Force to effect the removal of Munoz are hereby stayed, and Munoz shall be reinstated to his former position as a GS-11/7 Equipment Specialist

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[8] *See NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979); *Love v. Sessions*, 568 F.2d 357, 360 (5th Cir. 1978); *Sumler v. City of Winston-Salem*, 448 F. Supp. 519, 528 (M.D.N.C. 1978).

[9] "A subsection 1208(c) stay proceeding is not a determination on the merits." *In the matter of Frazier*, 1 MSPB 159 (1979), 161, n.8.

[10] *Kass, supra*, 27.

[11] The agency has argued that the failure of the Acting Special Counsel to file a brief setting forth the facts and any relevant authority under 5 C.F.R. sec. 1201.127(c)(3) (1980) precludes the award of a stay under section 1208(c). We disagree. Once the Acting Special Counsel has satisfied the requirements of *Kass* for a petition under section 1208(c), subsequent petitions for stays under section 1208(c) need not be accompanied by a restatement of the previously filed brief. In this case, the Board concurred in the Acting Special Counsel's determination of reasonable grounds to believe in the section 1208(c) stay granted August 18, 1980. The Acting Special Counsel would not be expected to accumulate new evidence while awaiting the agency's response to her recommendation for corrective action, and restatements of evidence already submitted would be unnecessarily redundant.

at the Directorate of Material Management, San Antonio Air Force Base, Texas;

(2) Any submissions made by the Acting Special Counsel in this proceeding shall be served by hand on the agency's Washington, D.C. representative;

(3) Within five (5) working days of this Order, a verified report shall be submitted to the Board on behalf of respondent setting forth the facts and circumstances surrounding compliance with the Order.

For the Board:

RUTH T. PROKOP.

November 3, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN F. GUIPRE v. DEPARTMENT OF THE INTERIOR	Docket No. DE315H09002

OPINION AND ORDER

Appellant resigned effective September 7, 1979, during his probationary period, from his position of Computer Programmer. He filed an appeal with the Board's Denver Field Office alleging that his resignation was involuntary. The presiding official found that the appellant was a probationary employee and as such was excluded from the statutory rights of appeal afforded Federal employees. 5 U.S.C. 7511(a)(1)(A). He further found that, absent an allegation of discrimination based on partisan political reasons or marital status, regulations do not provide a right of appeal to the Board in this case and dismissed the appeal. 5 C.F.R. 315.806.

On February 4, 1980, the Board received appellant's petition requesting review of the initial decision. In his petition, appellant alleged discrimination based on partisan political reasons.

5 U.S.C. 7701(e)(1) provides, in pertinent part, that the initial decision of the presiding official shall be final unless a petition for review is timely filed by one of the parties. The criteria for the Board's review of an initial decision are contained in 5 C.F.R. 1201.115. We find that appellant's allegation of discrimination based on partisan political reasons, raised for the first time in his petition for review, affords an insufficient basis on which to grant the petition, in view of those criteria. Appellant admitted that he was aware of the facts which form the basis of this allegation prior to the time the record was closed by the presiding official. Had appellant alleged some facts which should have placed the presiding official on notice that a claim was being made or implied that he was being discriminated against based on partisan political reasons, the Board would now be presented with a basis for reviewing the presiding official's dismissal of the appeal. However, such was not the case, and such an allegation now does not amount to a showing of new and material evidence upon which the petition may be granted.

The Board, having fully considered appellant's petition for review of the initial decision issued on January 10, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 4, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ARTHUR W. MARTINEZ
v.
UNITED STATES DEPARTMENT OF DEFENSE

Docket No.
SF075209144

OPINION AND ORDER

Petitioner was suspended for thirty days from his position of Property Marketing Specialist with the Defense Logistics Agency, Defense Property Disposal Office, San Diego, California, effective September 17, 1979. The action was based on two charges: (1) petitioner drove a Government car 864 miles, while a reasonable mileage allowance for the authorized travel was 501 miles; (2) he drove the car to the residence of another person on January 21, 1979. Petitioner appealed the removal to the Board's San Francisco Field Office challenging the evidence presented to support the charges and raising the affirmative defenses of selective enforcement of penalties and discrimination. The presiding official considered the first charge and found it to be supported by a preponderance of the evidence. He did not consider the second charge as sustention of the first charge would require the 30-day suspension under 31 U.S.C. 638a(C).

The Board ruled in *Spithaler v. Office of Personnel Management*, 2 MSPB 2, 2 (1980) that an initial decision "must identify all material issues of fact" and "summarize the evidence on each such issue sufficiently to disclose the evidentiary basis for the presiding official's findings of fact." Since the presiding official here has failed to consider the facts on the second charge, the initial decision does not satisfy the criteria of *Spithaler, supra.*

Further, in the initial decision, the presiding official characterized one of petitioner's allegations as questioning whether the action taken was for the promotion of the efficiency of the service. He stated, as to that matter, that as it was raised in connection with an affirmative defense, petitioner had the burden of proof. While he correctly held that the employee has the burden of proof on all affirmative defenses, 5 U.S.C. 7701(c)(2)(A)-(C), it is the agency which must prove, in accordance with 5 U.S.C. 7513(a), that it took action for such cause as will promote the efficiency of the service.

Accordingly, the petition for review is GRANTED and the case is REMANDED to the presiding official for adjudication of the merits of the second charge and its possible effects on petitioner's affirmative defenses of discrimination and selective enforcement of penalties.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 4, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ACTING SPECIAL COUNSEL
v.
U.S. DEPARTMENT OF THE ARMY

Docket No.
HQ120800032

OPINION AND ORDER

This case is before the Board on the Acting Special Counsel's request for stay pursuant to 5 U.S.C. sec. 1208(c) of the proposed removal of Jewel M. Mortensen from her employment with the Department of the Army at Dugway Proving Ground, Dugway, Utah.

The Acting Special Counsel's request was filed October 27, 1980. The agency's response was filed November 3, 1980. Both have been treated as timely filed and have been given due consideration by the Board in reaching its determination.

The following facts are undisputed. Between March 28, 1979, and February 14, 1980, Ms. Mortensen filed three Equal Employment Opportunity (EEO) charges against the agency alleging discrimination on the basis of race, sex and national origin. By letter dated July 2, 1980, J. Clifton Spendlove, Ms. Mortensen's second-level supervisor, notified her of his proposal to remove her for insubordination, unsatisfactory performance and misuse of employee protective procedures. Conduct cited to support the last charge included the following specifications: (1) "filing E.E.O. complaints based upon allegations which would not reasonably be believed to be supportive of discrimination issues"; (2) "demanding [EEO] hearings . . . with the intent not to present evidence to support . . . allegations"; (3) "[using] the complaint system . . . to further your personal desires concerning the management of the Environmental and Life Sciences Division"; and (4) "directing communications . . . outside the normal channels of complaint or grievance. . . ."

On August 21, 1980, seven days after a conference between personnel from the agency and from the Office of the Special Counsel, Mr. Spendlove amended the proposal notice by deleting the charge of misuse of employee protective procedures. On September 18, 1980, the Acting Special Counsel, believing Ms. Mortensen's removal to be imminent, filed a petition for stay under 5 U.S.C. sec. 1208(a).

The Acting Special Counsel has submitted four affidavits from former and current agency employees indicating that the proposed agency action may be based on personal animus on the part of Mr. Spendlove. She has also submitted Ms. Mortensen's performance appraisals from the years 1976, 1977, 1978 and 1979, which dropped dramatically after Ms. Mortensen began filing her EEO complaints.

The agency has submitted argument, but has not offered evidence in support of its position. The agency contends that when it deleted the charge of abuse of EEO procedures, the issue of whether Ms. Mortensen's removal violated 5 U.S.C. sec. 2302(b) (1) and (9) was rendered "moot." On the contrary, the Board has previously held that it will look behind an agency's stated reasons for an action where prohibited personnel practices are alleged. *In the matter of Munoz*, 4 MSPB 104 (1980).

The agency has also urged that the Board adopt the "but for" standard announced in *Williams v. Boorstin* [1] for EEO retaliation cases.[2] There are obvious problems inherent in applying the "but for" standard in the stay context where the standard of proof is much lower than it is in a trial on the merits.[3] However, even if the "but for" analysis were applied in this case, we note that the burden is on the agency to prove that the individual would have been removed absent the agency's "retaliation for the employee's participation in protected conduct." [4] The agency in this case has yet to submit any evidence whatsoever to support Ms. Mortensen's removal.

On the present record, the Board concurs in the Acting Special Counsel's determination that there are reasonable grounds to believe that Ms. Mortensen's removal was effected in retaliation for her EEO activities. Such action has previously been held to be a prohibited personnel practice under 5 U.S.C. sec. 2302(b) (9).[5] Accordingly, the Acting Special Counsel's request is GRANTED and the removal of Ms. Mortensen is hereby stayed for a period to and including January 6, 1981. Any request for an extension of the stay shall be filed on or before December 15, 1980. Any response by the agency shall be filed on or before December 22, 1980.

For the Board:

RUTH T. PROKOP.

November 5, 1980

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[1] No. 79-1684 (D.C. Cir. Oct. 3, 1980), 17.

[2] The "but for" test in dual motivation cases may be stated as follows: but for the agency's retaliation for protected conduct, the employee would not have been removed.

[3] *See In the matter of Frazier*, 1 MSPB 159, 162 (1979).

[4] *Williams v. Boorstin*, No. 79-1684 (D.C. Cir. Oct. 3, 1980), 17.

[5] *In the matter of Frazier*, 1 MSPB 159, 190 (1979); *In the matter of Munoz*, 4 MSPB 103, 105 (1980).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERTO SMITH
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075299010

OPINION AND ORDER

The record in this proceeding shows that appellant, Roberto Smith, is a veteran of the Vietnam era who served two tours of duty in the United States Marines and was twice honorably discharged. Within five weeks of his last honorable discharge, he was appointed by the Department of the Navy to a position as a security guard at the Naval Station in San Diego, California, under the Veterans Readjustment Program. He had served in this position for less than four months when he was terminated by the agency for unspecified pre-employment conduct and without an opportunity to reply. The termination notice stated only that he was to be terminated 16 days later for "unsuitability" and that the termination was based on pre-employment conduct considered "incompatible with the sensitive nature of his position as a guard at the Naval Station". His appeal to the Board's field office was dismissed on the ground that since he had served in his position less than one year, he had no statutory right of appeal under 5 U.S.C. 7511.

Appellant has petitioned us to review that dismissal of his appeal. He contends that his rights were violated because he did not receive a detailed statement of the reasons for his termination, was told that he was not entitled to any appeal, and was prohibited from submitting a reply to the agency. He strongly contends that his termination was unjustified on the merits.

Before considering any of his arguments as to denial of procedural and substantive rights, the Board must find that it has jurisdiction to entertain his appeal. The Board's jurisdiction under 5 U.S.C. 7701(a) to hear appeals from agency actions arises when the agency action is appealable to the Board under "any law, rule, or regulation." The issue presented by this case thus is whether the summary removal of a veterans readjustment appointee from a position occupied for less than one year is an action appealable to the Board. We have searched the pertinent law, rules, and regulations and have found no basis for jurisdiction in the Board. We hold that no law, rule, or regulation has created a right of appeal to the Board by an employee in appellant's position.

The Veterans Readjustment Program under which appellant was appointed was created by Executive Order 11521[1] to ease the transition of Vietnam era veterans to civilian life. The only reference to removal is for failure to satisfactorily perform assigned duties and failure to participate in a training or education program under which he was appointed. Such removals are to be executed in accordance with "appropriate procedures."[2] No procedures are specified for these removals and no reference is made to appeals from removals.

The Executive Order also provides that any law, Executive Order, or regulation that would disqualify an applicant for appointment in the competitive service will also disqualify an otherwise eligible veteran.[3] The Executive Order does not provide any procedures for determining this disqualification or any appeals from such a determination.

The Civil Service Commission (now Office of Personnel Management)[4] was ordered to prescribe such regulations as might be necessary to carry out the provisions of the Order.[5]

Executive Order 11521 was codified by 38 U.S.C. 2014[6] which was enacted to promote federal employment opportunities for qualified veterans of the Vietnam era. With certain specific limitations not here pertinent, 38 U.S.C. 2014(b)(1) provides that such veterans are to be eligible for appointment in accordance with regulations prescribed by the Office of Personnel Management under the terms and conditions of Executive Order 11521.

In accordance with section 2014(b)(1), OPM adopted 5 C.F.R. Part 307 entitled Veterans Readjustment Appointments. OPM prescribed the basic eligibility standards for veterans readjustment appointments in section 307.102. Section 307.105 makes applicable the procedures under Part 432 for separation of these appointees if they fail to perform their assigned duties or satisfactorily participate in a training or education program. Even these procedures, under Part 432, are specifically limited by Section 307.105 to those who have completed one year of continuous service. Part 307 does not prescribe for veterans readjustment appointees any procedures for other removals, either for pre- or post-employment reasons, and no rights of appeal are created in this Part of the regulations.

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[1] 35 Fed. Reg. 5311 (March 26, 1970) reproduced as a note to 5 U.S.C. 3302 (1977); as amended by section 2-101 of Executive Order No. 12107, Dec. 28, 1978, 44 Fed. Reg. 1055 to change references to the Civil Service Commission to OPM.

[2] Section 1.(d).

[3] Section 3.

[4] Reorganization Plan No. 2 of 1978, section 102, 43 Fed. Reg. 36037 (except as otherwise specified) transferred all functions vested in the Civil Service Commission to the Director of the Office of Personnel Management.

[5] Section 5.

[6] Vietnam Era Veterans' Readjustment Assistance Act of 1974.

The OPM regulations at Section 307.103(c) further provide that veterans readjustment appointments are subject to OPM investigation. The regulations repeat the terms of the Executive Order that a "law, Executive Order, or regulation which disqualifies a person for appointment in the competitive service" also disqualifies a person for a veterans readjustment appointment. The regulations do not prescribe how these disqualifications are to be determined or provide directly or by reference to any right of appeal.

Nor do the rights of appeal conferred by OPM on probationers benefit appellant. The Executive Order specifies that veterans readjustment appointees hold excepted appointments and OPM regulation 307.101(c) also defines these appointments as "excepted." OPM's regulations for probationers appearing in Part 315 apply only to career or career-conditional appointments.[7] Thus, veterans readjustment appointees do not enjoy the rights of appeal to the Board created by section 315.806.

The Civil Service Reform Act of 1978 [8] provides no relief for appellant. Subchapter II of Chapter 75 of Title 5 covers removal actions but specifically excludes employees who have served less than one year whether they are appointed in the competitive service or are preference eligibles (such as a veteran) in the excepted service. Thus, the right of appeal [9] to the Board under section 7513(d) does not benefit appellant.

Having found no law, rule, or regulation under which appellant has a right to appeal to the Board, we must affirm the dismissal of the appeal by the field office. Having so concluded, however, we must observe that the effect of our conclusion is that individual veterans appointed under the Veterans Readjustment Program have no appeal rights to the Board during their first year of service, and thus could be subjected to wholly arbitrary dismissals without administrative recourse.

Here appellant was dismissed on a charge that he is "unsuitable" because of pre-employment conduct incompatible with the sensitive nature of his position as a guard at a Naval Station. The possible defamatory inferences from the charge are legion. In the future, he may suffer untold harm if he is unable to meet such a charge. He must disclose the dismissal on applications for federal employment and may also be required to do so by non-federal government agencies and some entities in the private sector.

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[7] Thus appellant's argument that his rights under 315 FPM S8-4 (relating to probationers) were violated has no merit.

[8] Pub. L. 95-454, 92 Stat. 1111 (1978).

[9] 5 U.S.C. 7511(a) excludes from the term "employee" someone who has completed less than one year service.

He has no statutory or regulatory right to have the agency consider any response or to have his summary dismissal reviewed even procedurally. Thus, an appointment intended to be remedial may end in a dismissal that the employee is unable to challenge administratively and that may cloud his future chances for civilian employment, thus defeating the remedial purpose of the program as to that veteran.

The only administrative protection Congress has afforded such appointees is by review and evaluation of the program through reports required by statute. Under 38 U.S.C. 2014(d), OPM is responsible for reviewing and evaluating the implementation of the section and the activities of each agency in carrying out the purposes of the section. OPM is required to obtain and publish reports at least semiannually on the implementation and activities under the section from each agency. Included in the information required by statute to be obtained and published is (1) the number of individuals whose veterans readjustment appointments were terminated (since the last report); (2) a "complete listing of categories of causes of appointment terminations and the number of such individuals whose employment has terminated falling into each such category" and (3) the number of such terminations initiated by the agency OPM is required to submit to Congress annually a report on the activities carried out under section 2014. Congress thus has provided for a statistical evaluation and review of the program as a whole but has not expressly provided for review of actions taken against individual veterans.

These reports provide OPM the only information from which an overall determination may be made as to whether agencies may be arbitrarily employing vague charges for terminations and seriously further disadvantaging veterans' future efforts to obtain civilian employment. The lack of regulatory provision for administrative appeal and OPM's regulatory implementation of the program and its review and evaluation of the statistical data are not matters subject to our authority.

The petition for review is DISMISSED and the initial decision is AFFIRMED for the reasons stated in this Opinion.

This is a final decision of the Merit Systems Protection Board on this case. Appellant is hereby notified of his right to file a civil action in the appropriate U.S. Court of Appeals or U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 6, 1980*

CONCURRING OPINION OF BOARD MEMBER WERTHEIM

The Board today holds, with obvious reluctance, that no law or regulation gives it jurisdiction to consider Roberto Smith's claim that he was improperly removed from his civilian position with the Navy Department without an opportunity to rebut the stigmatizing charge of "unsuitability" for federal employment and the false accusations on which that charge rests.[1] This result arises solely from the absence of any statutory or regulatory provision conferring on veterans readjustment probationers like Smith a right of appeal to this Board. Under Executive Order 11521 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VRA Act), the Office of Personnel Management (OPM) has authority to provide such appeal rights by regulation but has failed to do so.

I concur in the Board's conclusion because our appellate jurisdiction has been expressly confined by Congress to actions made appealable to the Board by "any law, rule, or regulation," 5 U.S.C. 7701(a). However, I write separately to set forth my view that neither the President nor Congress has authorized OPM or the Navy to deprive veterans readjustment probationers of all procedural safeguards in this manner.[2]

At the outset it must be recognized that a serious question of procedural due process underlies this case. Without attempting to resolve that question here, it is clear that decisions of the federal courts indicate that Roberto Smith's constitutional right to protection of his "liberty" interest in his good name and reputation was implicated when the Navy allegedly created and disseminated a false and defamatory impression about him in connection with his termination. *See*, e.g., *Owen v. City of Independence*, — U.S. —, 100 S. Ct. 1396, 1406 note 13 (1980); *Codd v. Velger*, 429 U.S. 624, 628 (1977) (per curiam); *Bishop v. Wood*, 426 U.S. 341, 348 (1978); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).[3] To trigger due process protections, dissemination of the derogatory information need not have been made to the public at large. It may be sufficient that the information was memorialized in an official report that could be relied upon by the Navy or another federal agency in the event that Smith reapplies for a federal position.[4] Indeed, according to Smith, the Navy's action in this case has already made it impossible for him to take previously scheduled civil service examinations for other federal law enforcement positions.

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[1] The determination of unsuitability rested upon a false charge that appellant had been arrested, five years earlier during his first tour in the Marine Corps, for child abuse. According to appellant, this charge was based entirely on a mistaken interpretation of a 1974 incident in which military police responded to neighbors' complaints of a loud argument between appellant and his former wife who then falsely accused him of child abuse, but he was not arrested and the investigation resulted in no criminal or disciplinary charges. Two months later he was honorably discharged and accepted for re-enlistment. For the limited purpose of considering appellant's jurisdictional claim, his factual allegations are taken as true. The Board has made no determination on the merits of those allegations.

[2] The relief which this Board has not been empowered to provide may be available to Smith from the federal courts.

If Smith's stigmatization claim establishes a deprivation of liberty, the remedy mandated by the Due Process Clause is "an opportunity to refute the charge." *Board of Regents v. Roth*, *supra*, 408 U.S. 573. There would be little need to determine precisely how much process Smith was due,[5] for the OPM regulations provided him no process at all.[6] Unlike probationary employees in the competitive service, who are entitled by OPM regulations to advance written notice stating in detail the specific reasons for a proposed removal, a reasonable time to answer and to furnish affidavits in support of the answer, to have the answer considered by the agency in reaching its final decision, and to appeal to this Board if those procedural requirements have not been satisfied, 5 C.F.R. 315.805 and 315.806(c), a veterans readjustment probationer like Smith is given no procedural protections whatsoever by OPM's regulations in Part 307.[7] *Compare Doe v. Civil Service Commission, supra,* 483 F. Supp. at 573 ("When the information collected, reported, and disclosed . . . is sufficiently damaging to threaten the future employment opportunities of a non-competitive service applicant, . . . the procedural protections already granted to the competitive service candidate are constitutionally required").

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[3] *See also Bishop v. Tice*, 622 F.2d 349, 354 (8th Cir. 1980); *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977); *Harper v. Blumenthal*, 478 F. Supp. 176 (D.D.C. 1979). In two cases involving derogatory information in OPM investigative reports, a constitutionally protected liberty interest was found even though the plaintiffs were merely applicants, not employees. *Larry v. Lawlor*, 605 F.2d 954 (7th Cir. 1978); *Doe v. Civil Service Commission*, 483 F. Supp. 539 (S.D.N.Y. 1980).

[4] *See McGhee v. Draper*, 564 F.2d 902, 910 (10th Cir. 1977); *Velger v. Cawley*, 525 F.2d 334, 336 (2d Cir. 1975), *rev'd on other grounds sub nom. Codd v. Velger*, 429 U.S. 624 (1977) (per curiam); *Doe v. Civil Service Commission, supra*, 483 F. Supp. at 570-571; *Doe v. Anker*, 451 F. Supp. 241 (S.D.N.Y. 1978). *Compare Old Dominion Dairy Products, Inc. v. Secretary of Defense*, No. 79-1821 (D.C. Cir., July 29, 1980) (Slip Op. at 19).

[5] *See*, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gray Panthers v. Harris*, No. 79-1603 (D.C. Cir., Oct. 24, 1980).

[6] The Navy Department seems to have accorded Smith more "process" than OPM regulations require. The day before he was given his removal notice, Smith was questioned orally by a Navy captain as to whether, with respect to the 1974 incident referred to in note 1, *supra*, he had falsely denied on his federal employment application (Form 171) that he had ever been convicted of a crime. However, the removal notice did not recite any such charge, and in its response to Smith's appeal to the Board's San Francisco Field Office the Navy had stated that there was no evidence that Smith had falsified his application for employment and that he was not terminated for that reason. We need not decide whether the Navy's pre-removal interview of Smith sat-

Against this backdrop of a serious constitutional problem, the question whether Congress or the President has authorized such summary procedures for veterans readjustment appointees must be considered. The Supreme Court addressed a similar question in *Greene v. McElroy,* 360 U.S. 474 (1959), involving procedures established by the Secretary of Defense under which an employee of a government contractor had his security clearance revoked with consequent loss of employment without any opportunity to confront and cross-examine his accusers. Acknowledging that the Secretary possessed delegated authority under successive Executive Orders and legislative enactments to safeguard classified security information, the Court held that in the absence of explicit authorization from either the President or Congress the Secretary was not empowered to deprive the employee of his job without affording him the procedural safeguards of confrontation and cross-examination.[8] Without deciding whether the President had inherent power to authorize the procedures which the Secretary had imposed or whether Congress had granted the President such power, the Court found that the silence of the Executive Orders and legislation as to such procedures could not be construed as the

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isfied any applicable due process requirements. *But compare* 5 C.F.R. 315.805; *Doe v. Civil Service Commission, supra,* 483 F. Supp., 573.

[7] The Civil Service Reform Act gave VRA appointees, as preference eligibles in the excepted service, adverse action appeal rights after completing one year of current continuous service in the same or similar positions. 5 U.S.C. 7511(a)(1)(B). However, during the first probationary year, such rights are dependent upon OPM regulations.

[8] The Court also cited with approval the finding of the court of appeals that ". . . following the Government's action, some stigma, in greater or less degree, has attached to Greene." 360 U.S., 491 note 21.

requisite explicit authorization for the Secretary to establish those procedures.

In concluding that the Secretary had thus acted beyond his authority in prescribing procedures that lacked the traditional safeguards of due process, the Court stated:

> . . . Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action. . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. . . .
>
> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process . . . [citing cases]. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition. (360 U.S., 507-508).

Considering Part 307 of OPM's regulations in light of *Greene* and the underlying constitutional problem here which so closely parallels the one underpinning *Greene*, it is plain that the explicit authorization from either the President or Congress which *Greene* would seem to require for OPM's procedures in Smith's case cannot be found in either Executive Order 11521 or the VRA Act. If anything, the contrary intention is suggested by the language and purpose of both the Executive Order and section 403(a) of the VRA Act, 38 U.S.C. 2014.

The veterans readjustment appointments program, which originated with Executive Order 11521, provided a path for qualified veterans of the Vietnam era to acquire competitive status as an alternate to the usual probationary appointment under Part 315 of OPM's regulations.[9] The Order's provision that any law, Executive Order, or regulation "which would disqualify an applicant for appointment in the competitive service shall also disqualify a person otherwise eligible" for a veterans readjustment appointment[10] may be read as implying that the same procedures should attach to such disqualification as attach under Part 315 for other probationers. This reading of the Order would be more consistent with its stated purpose which was to "assist veterans of the armed forces in readjusting to civilian life" and specifically to reflect recognition of this obligation by "the Federal Government, as an employer, . . . *in its personnel policies and practices.*"[11] It would also be more consistent with the fact that nothing in the Executive Order suggests that the procedural protections afforded to other probationers under Part 315 are any less appropriate for veterans readjustment appointees, or that it might be necessary for the Civil Service Commission (now OPM) to withhold those procedures from VRA probationers in exercising its delegated authority to prescribe "such regulations as may be necessary to carry out the provisions" of the Order.[12]

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[9] Sec. 1(f) of the Order, 5 U.S.C. 3302 note.

In enacting the VRA Act, which codified the essentials of Executive Order 11521, Congress likewise emphasized the remedial purpose of the veterans readjustment appointments program. Subsection (a) of 38 U.S.C. 2014 provides, "It is the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified disabled veterans and veterans of the Vietnam era." As in the Executive Order, there is no suggestion in the VRA Act that in order to carry out that policy and purpose, it would be necessary or even was contemplated that veterans readjustment appointees should be denied the procedural protections made available under Part 315 to other probationers.

Viewing Executive Order 11521 and the VRA Act in accordance with the analysis mandated by *Greene*, I cannot conclude that OPM was authorized to prescribe regulations, or the Navy to take administrative action, that would deprive veterans readjustment appointees like Roberto Smith of the minimal due process protections afforded other probationary candidates for career or career-conditional employment. Particularly with regard to disqualification for suitability reasons arising from pre-employment conditions, there is no basis in the Executive Order or VRA Act for distinguishing between veterans readjustment appointees and other probationers. This is especially so in light of the clear remedial purpose of the VRA program, the stated intent of the

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[10] *Id.*, sec. 3.

[11] *Id.*, Preamble (emphasis supplied).

[12] *Id.*, sec. 5.

Executive Order that the federal government reflect "in its personnel policies and practices" its recognition of the need to assist veterans readjusting to civilian life, and the stated policy and purpost of the VRA Act to "promote the maximum of employment and job advancement opportunities" for such veterans.

If OPM and the Navy were thus not authorized to deny Roberto Smith the procedural protections of 5 C.F.R. Part 315, the question then arises whether in consequence he was in fact entitled to those protections including the administrative appeal rights of 5 C.F.R. 315.806 conferring appellate jurisdiction on this Board. On this point I am forced to conclude that the Board lacks jurisdiction to so declare under the existing regulations, for the *failure* of OPM's regulations to grant jurisdiction to this Board, no matter how erroneous or unauthorized such failure may be as a matter of substantive law, cannot in itself constitute a *grant* of such jurisdiction. The Board has no authority to correct omissions in its own regulatory jurisdiction in order to remedy what it may view as an erroneous withholding of such jurisdiction in OPM's regulations, since Congress has expressly limited our jurisdiction to actions made appealable to the Board by "any law, rule, or regulation." 5 U.S.C. 7701(a).[13] Veterans readjustment appointees in Roberto Smith's position, therefore, must seek their remedies elsewhere until a change in law or regulation confers jurisdiction on this Board in such cases.

RONALD P. WERTHEIM,
Member of the Board.

November 6, 1980

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[13] Even if the Due Process Clause of the constitution entitles Smith to some form of fair administrative appeal, nothing in the constitution mandates that such appeal be to this Board. The constitution, therefore, is of no direct avail to Smith on the threshhold jurisdictional issue before this Board.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Charles P. Lomartere	Docket No. DC075209154
David Lee Morgan	Docket No. DC075209180
Murray Delloff	Docket No. DC075209153
Edward S. Itoga	Docket No. DC075209188
Leland R. Long	Docket No. DC075209189
Donald F. Rock	Docket No. DC075209190
Dale M. Kverno	Docket No. DC075209175
Wayne R. Connaway	Docket No. DC075209171
Dennis R. McGuane	Docket No. DC075209176
Raymond W. Brown	Docket No. DC075209174
Donald E. Young	Docket No. DC075209194

v.

Department of Defense

Opinion and Order

The captioned cases involve action by the agency in 1979 to change the employees to lower grade based upon the application of a classification standard which was revised in 1977. Since these cases involve identical or similar issues, they are consolidated pursuant to 5 C.F.R. 1201.36(a)(1).

Three presiding officials of the Board's Washington, D.C. Field Office reversed the agency action, finding that although the agency has broad discretion to establish teaching positions and regulate the conditions of employment for those positions, including their basic compensation, the agency failed to demonstrate the reasonableness of the standards it applied. This conclusion was based on a comparison of the Office of Personnel Management (OPM) standards for Teacher positions, GS-1710, which the agency said it applied, with the positions occupied by the appellants. The agency has petitioned the Board to review these determinations, claiming that they amount to an unauthorized decision by the Board on the proper classification of the positions.

These appellants, who are preference eligibles with more than one year of current continuous service in the excepted service, were not given grade retention under 5 U.S.C. 5361 *et seq.* As such, their reduction in grade is an adverse action which had to be taken in accordance with 5 U.S.C. 7513 and which is appealable to the Board. *See* 5 U.S.C. 7511(a)(1)(B), 5 U.S.C. 7512(3), and

5 U.S.C. 7701. While the agency correctly asserts that it, and not the Board, has the authority to classify these positions, the presiding officials did not attempt to decide their proper grade and class. Rather, they narrowly reviewed the actions simply to determine whether the agency showed that they were in accordance with its statutory authority, and determined that it had not. We find no error in the presiding officials' scope of review of these cases.

20 U.S.C. 902 provides, in pertinent part:

> (a) . . . the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—
>
> > (1) the establishment of teaching positions;
> >
> > (2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population.

The agency did not assert that it attempted to make a direct comparison of "similar positions . . . in urban school jurisdictions in the United States. . . ." It stated, instead, that it had relied on OPM classification standards. Since such standards may have been developed in a manner which would have complied with the statutory requirement, it was proper to review the actions to determine whether use of such standards brought about compliance with the law. The Board finds that the presiding officials properly concluded that it did not. While the Secretary of Defense had discretion to follow any system of classification to meet the statutory standard, in order to do so it was incumbent on the agency to show that, as now classified, compensation for the positions equated to that "for *similar* positions of a *comparable* level of duties and responsibilities." Since the OPM standard related specifically and only to Teacher positions, and these appellants occupied positions as Guidance Counselors, the agency failed to show compliance with the statute when it simply adopted the Teacher standards verbatim, without desk audits or other input from the incumbents or their supervisors, and without any consideration of the special responsibilities of any of the incumbents. Absent a showing, either directly or through use of a standard that did so, that the jobs were classified with reference to "similar positions" with "comparable" duties, the agency failed to prove compliance with 20 U.S.C. 902. Had it shown that it met the statutory and any applicable regulatory standards, the Board would not then be authorized to go behind the action.

Accordingly, the petitions for review are hereby DENIED for failure to meet the criteria for review set forth at 5 C.F.R. 1201.115.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decisions to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in these appeals. The initial decisions shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellants are hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 7, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ACTING SPECIAL COUNSEL v. PAUL D. SULLIVAN	Docket No. HQ120600018

ORDER

In this proceeding pursuant to 5 U.S.C. § 1206(g)(1), respondent Paul D. Sullivan has filed three motions, including a Motion for Hearing Before the Board filed on September 26, 1980, a Motion to Quash Subpoena and for Protective Order filed on October 8, 1980, and a Motion for Permission to Take Discovery filed on October 21, 1980. This Order rules on those motions as follows:

1. By his motion of September 26, 1980, respondent requested that this case be heard by the Board, rather than by an administrative law judge. This motion is premature since this case currently is pending before the Board and has not been assigned to an administrative law judge. Respondent's motion accordingly is DISMISSED without prejudice.

2. By his motion of October 8, 1980, respondent moved to quash a subpoena issued by the Acting Special Counsel on September 25, 1980, to A. Vernon Weaver, Jr., Administrator of the Small Business Administration (SBA). By that same motion, respondent also objected to interrogatories served by the Acting Special Counsel on September 29, 1980, on ten past and present SBA regional administrators. Respondent contended that the subpoena and interrogatories were improperly issued because the Acting Special Counsel failed to comply with the Board's regulations governing discovery, and requested an order directing the Acting Special Counsel to comply with the Board's regulations with respect to all discovery in this case. The Acting Special Counsel filed an opposition to that motion on October 20, 1980, and an addendum to her opposition on October 22, 1980. Respondent filed a reply to the Acting Special Counsel's opposition on October 27, 1980.

In brief, the parties disagree over whether the Acting Special Counsel has independent statutory authority under 5 U.S.C. § 1205(b)(2) to conduct discovery without Board approval, once a proceeding such as this one has been initiated by the Acting

Special Counsel before the Board. The statute provides in pertinent part:

> (2) Any member of the Board, the Special Counsel, and any administrative law judge appointed by the Board under section 3105 of this title may—
>
> > (A) issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia . . .

The Acting Special Counsel contends that this subsection confers independent authority upon her to conduct discovery in a proceeding before the Board. Accordingly, she asserts that she need not comply with the Board's discovery regulations which permit discovery only by an order of the Board issued pursuant to a written motion demonstrating the relevance of the information sought. 5 C.F.R. § 1201.71 *et seq.* (1980). However, the Acting Special Counsel concedes that once the Board implements prehearing procedures, all discovery should be conducted pursuant to Board regulations or orders. Respondent, on the other hand, asserts that a logical reading of the statute, fairness to the opposing party, and the interest in orderly proceedings require that the statute be read to limit the Acting Special Counsel's independent authority to the investigatory stage, which terminates when a complaint is filed before the Board.

We hold that, while the Acting Special Counsel has independent authority to issue subpoenas in aid of her investigations, all parties in an adjudicative proceeding which has been initiated before the Board, including the Acting Special Counsel, must comply with the Board's regulations for such proceedings. The statutory provision upon which the Acting Special Counsel relies, 5 U.S.C. § 1205(b), must be read in light of 5 U.S.C. § 1205(g) which provides that the Board may "prescribe such regulations as may be necessary for the performance of its functions." It is immediately apparent that such authority includes regulation of Board proceedings, including discovery. The Board regulations governing discovery apply specifically "in all complaints or requests" the Acting Special Counsel files with the Board. 5 C.F.R. § 1201.121(b) (1980).

Moreover, we believe that considerations of fairness dictate that the Board carefully regulate discovery in cases such as this one, which involves serious charges against respondent that could result in his removal from the federal service and the imposition of a $1,000 fine. A complaint ordinarily should not be filed in such cases until the investigatory stage has ended and the need for broad-ranging investigatory inquiry has ceased. *Cf. United States* *v. LaSalle National Bank*, 437 U.S. 298 (1978) (an Internal Revenue Service summons, which is used by the Commissioner in aid of his broad investigatory authority, may not be issued once the Service has made a recommendation for criminal prosecution to the Department of Justice). It would be unjust to allow the Acting Special Counsel to continue an unfettered search for evidence while subjecting respondent to the limits on discovery set out in the Board's regulations.[1]

Accordingly, respondent's motion to quash the subpoena in issue is GRANTED, without prejudice to the Acting Special Counsel's right to seek a Board subpoena for the same information in accordance with the Board's regulations. Respondent's request for a protective order with respect to the Acting Special Counsel's interrogatories is DENIED, in light of the order governing discovery in this case issued by the Board on October 30, 1980. By that order, the Board directed both parties to engage voluntarily in such discovery as they deem appropriate, and to seek Board orders compelling discovery only in instances where voluntary discovery cannot be obtained. The Acting Special Counsel's interrogatories to the regional administrators are not inconsistent with that order.

3. The respondent's motion for permission to take discovery, filed on October 21, 1980, is moot in light of the Board's order of October 30, 1980. Pursuant to that order, the respondent may commence discovery, including interrogatories directed to the Acting Special Counsel, without first obtaining a Board order. That motion accordingly is DENIED, without prejudice to respondent's right to seek a Board order compelling discovery in accordance with the terms of the Board's order of October 30, 1980, if voluntary compliance cannot be obtained.

For the Board:

RONALD P. WERTHEIM.

November 6, 1980

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[1] Acting Special Counsel also asserts that respondent lacks standing to move to quash the subpoena in issue under 5 C.F.R. § 1201.82 (1980). We need not address this issue, however, because Acting Special Counsel has asserted that she has suspended all dicovery in this case pending a determination of the general applicability of the Board's discovery regulations. Thus, an early resolution of this question is in the interest of both parties, and in the interests of justice.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK BRANDON
v.
DEPARTMENT OF THE ARMY

Docket No.
DC035109020

OPINION AND ORDER

The petitioner, Frank Brandon, appealed a reduction in force (RIF) which resulted in the abolishment of his position as an employee development specialist, GS-235-13. Petitioner was offered, and he accepted, a position as management analyst, GS-343-12. Petitioner's appeal was heard in the Washington, D.C. Field Office, and the presiding official sustained the RIF. Petitioner's attorney then petitioned the Board to review the initial decision.

In the petition for review the petitioner restated the argument presented to the presiding official that his position was abolished in violation of agency regulations. Specifically, he argued that the agency was obliged to conform to a manpower survey conducted by the Department of the Army Inspector General in October 1978. The survey allegedly "validated" his position and mandated abolishment of the personnel clerk, GS-5, position located in his office. He further claimed that this mandatory survey was not followed because the agency wished to keep the personnel clerk since the clerk was younger.

The presiding official found that the manpower survey upon which petitioner relied was a survey of the functions of the unit as of the day the survey was made, and that it only determined the number of positions required to carry out the functions of the unit. Recommendations of the survey team as to abolishment of specific positions were not mandatory, and the team did not validate any individual position. Therefore, the presiding official concluded that the agency did have authority to decide which positions to abolish or restructure when the survey indicated that a unit was overstaffed.

The arguments in the petition go to the weight of the evidence. The petition, however, ignores the testimony of the Chief of Military Personnel and Manpower Management, who was responsible for the survey, as well as the other evidence which the presiding official found persuasive. Petitioner has not identified any new evidence which would refute the evidence the presiding official found credible. *See Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

Nevertheless, it appears that the presiding official erroneously held that the appellant has the burden to establish that a RIF action was "based on reasons other than for reducing the work force." Initial Decision 2. We rejected this concept in *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980). Since Losure had not been decided at the time the initial decision was rendered, or when the petition was filed, the petition will be granted in order to consider the impact of *Losure* on this case.

In *Losure* we held that an agency must support a RIF action by a preponderance of evidence as required by 5 U.S.C. 7701(c)(1)(B). Although an agency may initially establish that the regulations were properly invoked, thereby shifting the burden of going forward with rebuttal evidence to the employee, the burden of persuasion never shifts from the agency. *Losure*, 366. Therefore, although the presiding official found that the RIF was not in violation of agency regulations and was taken for valid reasons, she erroneously applied the burden of proof to appellant's rebuttal evidence.

After considering the record and reviewing the initial decision, we conclude that it is unnecessary to remand this case. The agency's evidence clearly amounted to a preponderance of the evidence showing that the action was proper. Appellant's arguments and evidence, which should have been considered in rebuttal, are insufficient to rebut the agency's case.

In this case, unlike *Losure*, the duties of the position abolished were genuinely redistributed to other employees in the personnel office. The position was not, in effect, transferred to another person in order to get rid of appellant. Certainly, such a reorganization is a permissible reason for a reduction in force. 5 C.F.R. 351.201(a). Therefore, we conclude that the agency action was proper.

Finally appellant contends that he made a prima facie case of age discrimination.[1] Appellant's discrimination claim centered on the allegation that the agency was obliged to abolish the personnel clerk, GS-5, position and that his job had been validated. Since we found that the agency was not obligated to do so, we find no error in the presiding official's conclusion that the appellant failed to establish a prima facie case of discrimination.

Accordingly, the initial decision is modified as set forth above and, as modified, is affirmed.

This is the final decision of the Merit Systems Protection Board.

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[1] Appellant's claim of discrimination is cognizable as an affirmative defense, which he must establish. *See* 5 U.S.C. 7701(c)(2)(B), 2302(b)(1)(B), and 5 C.F.R. 1201.56(b)(2).

The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 10, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HOPE SIBERT
v.
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Docket No.
PH075209148

OPINION AND ORDER

On January 21, 1980, Hope Sibert appealed the action of the Social Security Administration removing her from the position of Computer Systems Analyst, effective December 30, 1979. In an initial decision dated May 20, 1980, the Board's presiding official sustained the agency charges that appellant submitted false claims for compensation and expenses while in travel status.

In her petition for review, appellant contends that agency officials engaged in several procedural irregularities in accomplishing her removal. She asserts that the alleged procedural errors warrant reversal of the agency's action.

Appellant first asserts that communications between Dexter Rasmussen, the proposing official, and Nelson Brennman, the deciding official, violated her due process rights.[1] Prior to the passage of the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978), Civil Service Commission regulations required that the final decision concerning an adverse action be made by a higher ranking official than the proposing official. 5 C.F.R. 752.202 (f) (1978).[2] However, the regulations implementing the Reform Act contain no such requirement. *See* 5 C.F.R. Part 752 (1980). Inasmuch as the proposal and final decision may now be issued by the same person, we discern no violation of appellant's procedural rights resulting from communications between the proposing and deciding officials in a case where the agency has adopted a two-stage decision-making process not required by statute or regulation.

The appellant also argues that there were improper ex parte communications between Allen Dunham, the agency representative at appellant's hearing, and David Bowers, an employee who traveled with appellant on one of the trips for which she submitted false documents. However, even assuming that this conversation constitutes procedural error, appellant has not sought to demonstrate that the error was harmful. 5 C.F.R. 1201.56(b). Indeed, at the time of communication in question, Mr. Dunham had not been designated the agency representative (Agency response to petition for review, 4), and Bowers first contacted Dunham. Dunham advised Bowers that he was obligated to cooperate in the investigation concerning the vouchers and travel documents submitted for his trip with appellant. Accordingly, we find no prejudice to appellant as a result of this conversation.

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[1] Appellant first raised the argument concerning these *ex parte* communications in her petition for review. However, appellant apparently first learned of the communications at the hearing. (Hearing transcript, H.T., 124)

[2] Under these regulations *ex parte* communications between the deciding official and other agency officials involved in the adverse action were prohibited. *Ryden v. United States*, 585 F.2d 482 (Ct. Cl. 1978). But *see also*, *Henkle v. Campbell*, 462 F. Supp 1286 (D. Kan. 1978).

Appellant next contends that Brenneman should have disqualified himself as the deciding official in the removal action because he had been the deciding official in an earlier action suspending appellant. She argues that Brenneman was not impartial. The Presiding official thoroughly considered this argument in the initial decision and concluded that appellant had not sustained her burden of proving harmful error under 5 C.F.R. 1201.56. Appellant has raised no additional arguments herein and we conclude the presiding official did not err in making his finding.

Finally, appellant argues that she was not given notice of all the material considered by the agency in reaching the decision to remove her. 5 U.S.C. 7513 and 5 C.F.R. 752.401(b). She specifically points to a document contained in an Office of Investigation report dated April 18, 1979. The document shows that the Department of Justice declined to initiate criminal prosecution of appellant concerning the vouchers in question. (H.T., 79-83) The agency denies it considered this document, and by its very nature it is not the type of information on which the agency would base its decision to remove appellant. Appellant also alleges that files relating to one James Evans were improperly excluded from her evidence file. This file contains the record of an interview occurring August 11, 1978, between Dexter Rasmussen and Mr. Evans. Evans had accompanied appellant on one of the trips for which false documents were submitted. A statement from that interview was used to impeach Evans' testimony when he was called as a witness by appellant at the hearing. (H.T., 216) While it is clear that Evans' prior statement was contrary to appellant's claim that she had not intentionally falsified the documents, the agency asserts that it was only used to impeach the witness, and not relied on in the decision to remove her.

Appellant has introduced no evidence which indicates that the agency relied on this information which was not in the file. Moreover, the evidence which is contained in the file is sufficient to uphold the adverse action. Therefore, we find no harmful error in the fact that the record of the interview with Evans was not contained in appellant's file.

Since appellant has not shown any misinterpretation of law, rule, or regulation, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113 (b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby advised of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 10, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARTIN BENNETT
v.
U.S. CONSUMER PRODUCT SAFETY COMMISSION

Docket No.
NY075209080

OPINION AND ORDER

In October/November 1979, notices of classification error were issued to employees of the Consumer Product Safety Commission, New York area office, whose positions had been audited. Appellant was one of six nonsupervisory investigators with the agency whose position was downgraded from GS-12, Step 5, to GS-11, Step 4, with retained grade and pay through December 1, 1981. The effective date of the action was December 2, 1979. Appellant filed an appeal from this action with the Board's New York Field Office alleging that he had suffered a reduction in grade and pay under 5 U.S.C. 7512(3) and (4). The presiding official found that there had been no reduction in pay and that 5 U.S.C. 5366 precluded an appeal from the classification action which resulted in the reduction in grade when grade and pay retention provisions are applicable. Therefore, he dismissed the appeal for lack of subject matter jurisdiction.

Appellant in his petition for review has argued that it is "clear error to hold that 5 U.S.C. 5366(b) (1) and (2) limit the right of the downgraded federal employees to have their cases heard and resolved by the Board." In *Atwell v. Department of the Army*, 3 MSPB 8 (1980), the Board fully considered the right of federal employees to appeal position reclassifications when grade and pay retention provisions are applicable and the effect of 5 U.S.C. 5366 on such appeals. Having fully considered the language of 5 U.S.C. 5366 and its legislative history, the Board concluded in *Atwell*, 12, that:

> employees who continue to be assigned to positions which are reclassified downward, and who receive the benefits of 5 U.S.C. 5362 and 5363, may not appeal to the Merit Systems Protection Board from either the reclassification of the position or the reduction in grade and/or pay which, but for the grade and pay retention provisions of the Civil Service Reform Act, might otherwise have been appealable.

Applying *Atwell* to this case, the Board finds that the presiding official did not err in his interpretation and decision.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CLAUDE W. GRAHAM v. U.S. POSTAL SERVICE	Docket No. CH075299016

OPINION AND ORDER

The appellant was removed from a position with the U.S. Postal Service, Bulk Mail Center, Cincinnati, Ohio, for conspiring to falsify postal records. He appealed to the Board's Chicago Field Office. In his initial decision, the presiding official found the charge supported by a preponderance of the evidence and sustained the removal action. In his petition for review, the appellant contended that he did not receive a fair hearing. The agency filed no response.

The incident from which the charge against the appellant arose concerned a typing test given postal employees in October, 1978. The appellant asked another postal employee, Velma Williams, to take the test with him and to sign his name to her paper while he put her name on his. At the test, Ms. Williams was unable to sign appellant's name to her test paper. The appellant and Ms. Williams contacted the examination monitor afterwards to explain why there would be two test papers in Ms. Williams' name. Both Ms. Williams and the appellant admitted what they tried to do. The essential facts of the incident were not in dispute. Both employees were removed. Ms. Williams pursued the matter through a grievance which was settled by the removal being rescinded. The appellant therefore contends that he should be given like treatment. This contention had been raised in a grievance action and to the presiding official. Both times, circumstances were found to warrant a more severe penalty for the appellant.

The appellant contended in the petition for review that the presiding official erred in his statement that Ms. Williams was suspended for 11 days (initial decision, page 2). The records in the file support the accuracy of the presiding official's statement that, "Ms. Williams was removed on February 20, 1979, but she was restored to duty on March 3, 1979, with no backpay for the time lost prior to that date, as a result of a grievance settlement." The presiding official found that the net effect of these actions was to impose an 11 day suspension on Ms. Williams for her part in the incident. The Board finds no error in this regard. Even if this were an erroneous deduction on the part of the presiding official, the

Board does not find that it could serve as a basis for changing the initial decision.

The appellant contended that he was denied a fair hearing on this matter because two witnesses he requested, Charles Arns and Norman Griese, were not called to testify. The record reflects that Mr. Arns is an Employee and Labor Relations Officer at the Bulk Mail Center and that Mr. Griese is the "Acting General Manager" of the Bulk Mail Center. The file does not reflect when he acted in this capacity. Both were to testify on their views of the treatment of the appellant and Ms. Williams for the incident and the decision not to settle the appellant's grievance. Mr. Arns was also to testify on his statement that part of the basis for not settling the appellant's grievance was his past record of a 28 day suspension. The Board finds no error in the presiding official's decision not to call these witnesses.

The presiding official is authorized to rule upon offers of proof and receive relevant evidence. 5 C.F.R. 1201.41(b)(3). The presiding official also rules on all motions, witness, and exhibit lists. 5 C.F.R. 1201.41(b)(7). To the extent either potential witness in question would have testified concerning the treatment of Ms. Williams and appellant for the incident and the reasons for the decision not to settle appellant's grievance, it should be noted that appellant's grievance was not finally resolved at the time such testimony was sought. Testimony as to what occurred in an informal stage of an agency grievance proceeding is not relevant to the question of either the legality of the agency's action that is the subject of the grievance, or the agency's ultimate disposition of the grievance at its final stage. Furthermore, the presiding official independently reviewed the circumstances of the case and found the appellant's actions warranted imposition of the penalty of removal. For the reasons stated on page 2 of the initial decision, the presiding official found that the appellant and Ms. Williams were not similarly situated and that the differences in their actions could have served as a basis for different penalties. Thus even the agency's ultimate disposition of appellant's grievance will not serve as ground for a reversal of the presiding official's disposition of this appeal.

To the extent Mr. Arns might have testified concerning any consideration by him of appellant's past record in initially denying appellant's grievance at the second phase, such evidence was not relevant. There is no evidence of appellant's past disciplinary record in the file, and Mr. Arns never made any formal agency decision with respect to appellant's removal. The presiding official specifically found no evidence of agency reliance on past record in removing appellant, and considered whether the one incident of conspiracy to falsify postal records warranted appellant's removal. He so found and the Board finds no error in this determination.

Accordingly, the petition for review is DENIED. This is a final decision of the Merit Systems Protection Board on this case. The appellant is hereby informed of his right to petition for judicial review in the U.S. Court of Appeals for the appropriate circuit or in the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENNIS M. KOROWIN
v.
DEPARTMENT OF JUSTICE

Docket No.
AT531D09012

OPINION AND ORDER

Appellant was denied a within-grade salary increase approximately three months after being issued a 90-day notice and accompanying memorandum informing him that his performance was not at an acceptable level of competence (ALOC), setting forth those areas of alleged defective performance, and advising him that he would receive an " 'unsatisfactory' rating" if he failed to improve his performance.

Appellant appealed to the Board contending that the agency's action was improper because the agency failed to: (1) provide him a 60-day advance notice which complied with the requirements of 5 C.F.R. 531.407(b)(2); (2) issue a negative ALOC determination under 5 C.F.R. 531.407(c)(2); and (3) advise him of his right to reconsideration under 5 C.F.R. 531.407(c)(3)(ii). The agency conceded procedural error, and the presiding official, finding that appellant was prevented from exhausting his administrative remedies because of the agency's failure to notify him of his right to reconsideration, dismissed the appeal for want of jurisdiction and directed the agency to correct its procedural errors.

On review, appellant contended that, because the agency failed to make a negative determination, he should have been awarded his within-grade salary increase automatically. He also contended that the presiding official, contrary to the provisions of 5 C.F.R. 531.407(c)(5), erroneously permitted the agency to correct its procedural errors more than 60 days after the end of the waiting period.

Under 5 C.F.R. 531.407(b)(2), failure to inform or timely inform an employee 60 days in advance of the end of the waiting period that his work is not of an acceptable level of competence does not affect the agency's obligation to make a determination. Also, failure to inform an employee of a negative determination is not a basis for changing such determination. *See* 5 C.F.R. 531.407(c)(4). Hence, appellant was not entitled to a within-grade salary increase because of the agency's failure to provide the 60-day advance notice and a negative determination.

In regard to appellant's assertion that the agency is not permitted to correct procedural errors later than 60 days after the end of the waiting period, 5 C.F.R. 531.407(c)(5) imposes that 60-day limitation only where the agency actually made a negative determination but failed to so inform the employee in a timely manner. Because, in the instant case, the agency failed to make a negative determination, the 60-day limitation of 5 C.F.R. 531.407(c)(5) is inapplicable. Hence, the agency could properly have corrected its procedural errors although it was prohibited under 5 C.F.R. 531.409(b) from extending the waiting period in order to accomplish that purpose. We note that appellant contended that the presiding official made a finding of harmful error in the agency's actions. In the initial decision the presiding official specifically stated that he would not reach that issue because the merits of the agency's action were not then subject to Board review since no agency "decision . . . sustaining the negative determination" had been made.[1] 5 C.F.R. 531.407(e). Although the Board may, in an appropriate case, reverse an agency determination denying a within-grade increase, we find no error in the presiding official's decision not to do so in this case as it is presently postured. *See Degani v. Department of the Air Force*, 2 MSPB 81 (1980).

Accordingly, the petition fails to meet the criteria for review set forth at 5 C.F.R. 1201.115 and is hereby DENIED.

This is the final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 12, 1980*

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[1] The Board notes that the presiding official, at the prehearing conference convened for the limited purposes of determining whether there was procedural error and whether the Board had jurisdiction over the appeal, referred to certain agency actions as harmful error. *See*, for example, the prehearing transcript at 17 and 26. However, it is the initial decision under 5 C.F.R. 1201.111(b), and not the statements made during the conference which is subject to review by the Board. Those statements did not bind the presiding official and, as we here found, the question of harmful error could not properly have been reached absent a jurisdictional basis to do so.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SERAFIN N. PEREZ
v.
U.S. DEPARTMENT OF THE NAVY

Docket No.
SF075209004

OPINION AND ORDER

The Board by order dated March 19, 1980, reopened the addendum decision of the presiding official to consider whether an award of attorney fees is warranted in this case. As was stated in the Board's order, the issue in this case is "whether a finding that the agency failed to sustain its burden by a preponderance of the evidence is equivalent to a finding that the charges were clearly without merit. . . ." Pursuant to this order, the agency and appellant submitted briefs on this issue. The Office of Personnel Management intervened in the case and submitted a brief.

In the addendum decision, the presiding official recounted the facts leading up to his decision. They are, in pertinent part, as follows:

> The appellant was charged with allowing a subordinate to be absent from duty for almost four work days, while marking him present so that he was improperly paid by the Navy for this time. A number of witnesses testified as to whether the subordinate had in fact been present. I found the testimony on this point to be conflicting. The appellant introduced the testimony of a polygraph specialist who had examined both the appellant and his subordinate. I considered this testimony to be sufficient to tip the balance in the appellant's favor, and accordingly found that the charges were not sustained by a preponderance of the evidence.
>
> There was also an allegation of discrimination in the appeal. With reference to this, I found that "sufficient evidence was presented by the Navy in support of the charges so that the action taken was a reasonable one. No evidence is present to indicate that the action was a pretext." This finding was reinforced by a document submitted by the Navy along with its argument on this motion. This indicates that the appellant declined an opportunity to take a polygraph examination which was offered by the Navy before the action to demote him was taken. Inasmuch as my decision turned on the results

of such an examination, the declination reinforces my finding that the Navy acted in a reasonable manner in taking the action.

Although the presiding official found that the agency's action was reasonable, he believed that since the agency had not proven its case by a preponderance of the evidence, the action was without merit. He found this to be "sufficiently close to the statutory example of an action which is 'clearly' without merit" to justify an award of fees.

After review of the record, we conclude that the presiding official erroneously interpreted 5 U.S.C. 7701 (g) (1). The reasoning of the presiding official, and the interpretation urged by appellant, would mean that whenever an appellant prevailed on the merits of an action under 5 U.S.C. Chapter 75, an award of attorney fees would be appropriate. A plain reading of the statute does not support such a construction, and our decision in *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), mandates reversal in this case.

As we noted in *Allen*, 586, a fee award is appropriate under 5 U.S.C. 7701 (g) (1) when the appellant prevailed, when an award is warranted in the interest of justice, and when the fees claimed are reasonable. In the addendum decision the presiding official concluded that since the agency did not prove its case by a preponderance of the evidence, or in other words, since the appellant prevailed, a fee award was appropriate. This reasoning renders the second requirement under 7701 (g) (1), that a fee award must be "warranted in the interest of justice," meaningless. As we said in *Allen v. U.S. Postal Service, supra*, 587.

> Such a construction would accord no distinct meaning to the "interest of justice" standard, effectively treating that vital restriction as mere excess verbiage and a nullity, a result proscribed both by common sense and basic precepts of statutory construction.

We conclude, after considering the record, that a fee award is not appropriate in this case. As the presiding official noted, this was a close case and the evidence which persuaded the presiding official to find in appellant's favor was the result of a polygraph test introduced by the appellant, although appellant had declined to take a test before the action was initiated. We conclude, therefore, that the agency action was not clearly without merit.

The appellant argued in his brief that a fee award was appropriate because, since the charges were not sustained by a preponderance of the evidence, he was "substantially innocent of the charges." This argument suffers from the same reasoning as the addendum decision, that is, no distinct meaning would be accorded to the interest of justice standard if such an argument were adopted.

Accordingly, the addendum decision awarding attorney fees to appellant is REVERSED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GERARD J. CICERO
v.
U.S. POSTAL SERVICE

Docket No.
NY075209044

OPINION AND ORDER

The appellant was awarded attorney fees by the presiding official pursuant to 5 U.S.C. 7701(g)(1), which allows for the award of attorney fees when the appellant is the prevailing party and when it is determined that an award is warranted in the interest of justice. Pursuant to 5 U.S.C. 7701(e), the Director of the Office of Personnel Management (OPM) petitioned the Board to review the addendum decision. The agency also filed a petition for review. The appellant filed responses to the briefs filed by the agency and OPM.

The appellant was demoted from Security Officer in Charge to Security Police Officer based on several charges. The charges were: the appellant scheduled himself to work on November 23, December 24, 25, and 31, 1978, and January 1, 1979, without authorization; appellant represented that he had worked a full shift on December 24, 25, and 31, 1978, and January 1, 1979, when he did not; and the appellant falsified his time card.

After a hearing was held the presiding official reversed the agency action in an initial decision which became final on February 15, 1980. The presiding official found that the agency evidence was unreliable and not probative of the charges. She further found that the agency disregarded credible evidence which exonerated the appellant.

The appellant subsequently moved for an award of attorney fees, and the agency opposed the motion. The presiding official concluded in an addendum decision that a fee award was appropriate because the appellant "clearly won his appeal and that this fits within the parameters of 'clearly without merit.'" She added that since none of the charges were sustained, the action was clearly without merit. She awarded the appellant $7,065.15 for attorney's fees and costs. The issues presented are whether the award was appropriate, and whether the amount awarded was reasonable.

We previously said in *Allen v. United States Postal Service*, 2 MSPB 582 (1980), that failure of an agency to prove the charges does not mean that a fee award is necessarily warranted in the interest of justice. The agency's failure to prove the charge goes to only one of the requirements for a fee award—that the appellant prevailed. Although the presiding official said the action was clearly without merit because the agency did not prove any of the charges, this was not the only basis for her conclusion that a fee award was warranted.

The presiding official found in the initial decision that the agency relied on affidavits from employees who could not remember whether appellant was at work on the days in question. These employees gave the statements approximately three months after the alleged absences. Although five employees did remember that they had not seen appellant, this was inconclusive due to the size of the work area. On the other hand, eight persons did remember that appellant was at work, and phone calls placed on those days supported his position. In sum, the presiding official found that the agency's evidence, considered alone, was not probative of the charges, and when considered with appellant's evidence, provided no basis for the action. The charge that appellant was not at work when claimed was the centerpiece of the action. The charge of unauthorized scheduling of holiday work was totally unfounded, and the charge of falsifying the time card was intertwined with the central question of whether appellant did work the days claimed. In the addendum decision, the presiding official summarized this by saying that the appellant "clearly won his appeal." While this characterization is ambiguous, we agree with the conclusion that a fee award is warranted under the facts of this case.

Considering the evidence presented by the agency, it is clear that the deciding official should have known that the agency could not prevail on the merits of the case. *See Stout v. U.S. Postal Service*, 3 MSPB 440 (1980).[1] The demotion of appellant was based on affidavits given three months after the days in question. Most of the employees could not remember whether the appellant was or was not at work on any certain day. In response to the charges, the appellant presented positive evidence confirming that he was at work. We conclude that if the deciding official had properly considered the appellant's response in light of the paucity of the agency's evidence, he should have known that the demotion of appellant could not be sustained.

The second issue to be addressed, is whether the amount of fees awarded was reasonable. Appellant's attorney represented that he devoted 72.40 hours to the case and that a partner in the firm spent 19.25 hours on the case. The hourly rate claimed was respectively $75.00 and $95.00 per hour. The presiding official found that the amount of time claimed was reasonable but reimbursed all time claimed at the rate of $75.00 per hour. She also allowed $182.40 as expenses.

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[1] *See also, O'Donnell v. Department of the Interior*, 2 MSPB 604 (1980).

Our review of the initial decision and the record reveals an insufficient basis for determining the amount of fees. The most striking deficiency in this regard is the lack of an hourly breakdown of the attorney's services and expenses. The attorney submitted a list of the work done in connection with the case but did not submit time records in connection with the list. Without adequate time records, the presiding official cannot adequately determine whether the hours claimed are reasonable under the standards set forth in *Kling v. Department of Justice*, 2 MSPB 620 (1980).

The presiding official must also consider the hours spent by the partner. An hourly breakdown of his time is likewise necessary and since there is more than one attorney involved, it must be determined whether there was duplication of effort and to what extent the second attorney's work was necessary. In this regard, the presiding official should reevaluate the hourly rate claimed by both attorneys in light of their professional standing, experience, status (partner; associate), and specialized expertise. *Kling v. Department of Justice, supra*, 627.[2]

The petition for review is, therefore, GRANTED. That portion of the addendum decision which concludes that an award of attorney fees is appropriate, is modified as noted above and, as modified, is AFFIRMED. The determination as to the amount of fees is VACATED, and the case is REMANDED for reconsideration of this question as noted above.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 13, 1980*

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[2] *See also, Copeland v. Marshall*, No. 77-1351 (D.C. Cir., Sept. 2, 1980) (*en banc*).

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

OLLIE M. DARBY
v.
DEPARTMENT OF THE TREASURY

Docket No.
CH043209005

OPINION AND ORDER

Appellant, Ollie M. Darby, was removed from her position as a Revenue Agent with the Internal Revenue Service on July 13, 1979, based on charges of unacceptable performance in critical elements of her position, pursuant to 5 U.S.C. 4303.

Prior to the Board's decision in *Wells v. Harris*, 1 MSPB 199 (1979), the record in the instant case had been closed. However, following that decision, the agency requested the presiding official to consider the removal as a Chapter 75 [1] action. The agency's request was granted and the record was reopened by the presiding official for submission of further representations by the parties.[2]

In her submission, appellant alleged various errors in the presiding official's determination to decide the appeal under the guidelines of 5 U.S.C. Chapter 75. These contentions were rejected by the presiding official in his initial decision. In his initial decision, he found that the agency supported all but one of its charges by a preponderance of the evidence and concluded that appellant's removal would promote the efficiency of the service.

In her petition for review, appellant again alleges that the procedures issued by the agency constituted harmful error, in violation of 5 U.S.C. 7701(c)(2)(A), and that because of the *Wells* decision the agency action constituted a prohibited personnel practice, 5 U.S.C. 7701(c)(2)(B), and also was not in accordance with law, 5 U.S.C. 7701(c)(2)(C).

The Board has carefully considered the contentions contained in appellant's petition for review, finds them to be without merit, and rejects them. We find no basis to conclude that the agency's actions were not consistent with the Civil Service Reform Act or denied appellant the statutory protections provided therein.

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[1] 5 U.S.C. Chapter 75 (1979).

[2] The Board's practice has been to remand actions brought pursuant to an invalid performance appraisal system to afford agencies the option of bringing the action under Chapter 75 of Title 5. *e.g.*, *Budeshiem v. Federal Communications Commission*, MSPB Docket No. DC075299018 (June 2, 1980); *Clary v. Nuclear Regulatory Commission*, MSPB Docket No. DC043209001 (January 8, 1980); *Catliff v. United States Department of the Army*, MSPB Docket No. NY043209003 (January 8, 1980); *McIntire v. U.S. Department of Housing and Urban Development*, MSPB Docket No. DC43299002 (January 8, 1980).

The Board stated in *Wells*:

> [I]f a determination of inadequate performance is not made under a performance appraisal system provided in Chapter 43, then it may be processed as a Chapter 75 action [3]

The Board will not reverse agency actions because of noncompliance with Chapter 43 if the action is in compliance with the requirements of Chapter 75 and the agency has met the higher burden of proof required for such action.

Notice to appellant of the proposed action under Chapter 43 adequately meet the notice requirements of Chapter 75.[4] The appellant did not show how the initial invocation by the agency of the incorrect chapter of the U.S. Code constituted harmful error. Appellant did not show that the application of Chapter 75 would likely have affected the original agency decision.[5]

The Board, having fully considered appellant's petition for review of the initial decision and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 13, 1980*

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[3] *Wells*, 235.

[4] *Andrade, et al. v. Department of Air Force et al.*, 2 MSPB 117 (1980).

[5] *Id. See also Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MAYNARD D. ALSUP v. **DEPARTMENT OF THE AIR FORCE**	**Docket No.** **DA075209148**

OPINION AND ORDER

The appellant, Maynard D. Alsup, has petitioned for review of the dismissal of his appeal as untimely by the Dallas Field Office of the Merit Systems Protection Board. The agency, the Department of the Air Force, has not responded to the petition.

In an initial decision dated April 29, 1980, the presiding official found that the adverse action being appealed, the appellant's demotion from Machinist, WG-3414-10 to Machine Tool Operator, WG-3431-09, was effective on November 17, 1979, but that the appellant was not informed of the action until January 22, 1980. The presiding official noted that he had afforded the appellant an opportunity to explain why his petition for appeal had not been filed until February 28, 1980, or seventeen days after the twenty-day deadline imposed by 5 C.F.R. 1201.22(b). He then concluded that good cause had not been shown for a waiver of that deadline under 5 C.F.R. 1201.12, even though the agency had failed to notify the appellant of the time limit for filing an appeal. He reasoned that the petition for appeal form was signed and dated February 4, 1980, and insufficient explanation was offered for the delay between signing and filing.

We disagree with the presiding official's determination. The regulations of the Board provide that "[w]hen an agency issues a decision notice to an employee on a matter appealable to the Board the agency shall provide . . . [n]otice of the time limits for appealing to the Board. . . ." 5 C.F.R. 1201.21. We find that the agency's failure to comply with this important notice requirement in effecting the appellant's demotion, appealable under 5 U.S.C. 7512 and 7513, excuses a seventeen-day delay in filing the petition for appeal. *See Chiarelli v. Department of Treasury*, 3 MSPB 75 (1980).

Accordingly, the petition for review of the initial decision dated April 29, 1980, is hereby GRANTED, that decision is VACATED, and this appeal is REMANDED to the Dallas Field Office for further proceedings consistent with this opinion.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALFREDO HERNANDEZ, JR.
v.
DEPARTMENT OF THE NAVY

Docket No.
DA075299008

OPINION AND ORDER

The appellant has petitioned the Board to review the initial decision which sustained his removal. The petition was filed after the time prescribed in 5 C.F.R. 1201.113, and the appellant has not shown good cause for the delay. The petition is therefore denied. Upon review of the record, however, the Board orders that this case be reopened. 5 C.F.R. 1201.117.

The appellant initially requested that he be granted a hearing in Kingsville, Texas, where he was last employed. This request was denied, and appellant did not appear at the hearing in Dallas, Texas due to the costs involved.

As we held in *Joseph v. U.S. Postal Service,* 2 MSPB 327 (1980), when an appellant is unable to travel to the scheduled hearing site, the presiding official should consider whether the location should be changed. In this case the change in location would have benefited the agency, as well as the appellant, and the appellant was financially unable to pay the costs of his and his representative's travel to Dallas. Therefore, we conclude that appellant should be afforded an opportunity to attend a hearing in Kingsville, Texas as originally requested.

The initial decision is VACATED, and this case is REMANDED for further proceedings as set forth above.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ISIDORE KAPLAN
v.
DEPARTMENT OF THE ARMY

Docket No.
NY035199009

OPINION AND ORDER

The respondent is an employee of the Army Military Traffic Management Command, Bayonne, New Jersey. He appealed to the Board's New York Field Office from an action by the agency reassigning him without loss of grade or pay. That action was considered by the presiding official to have been a reduction-in-force action. In the initial decision, the presiding official reversed the agency action based upon a finding that the employee's competitive level had been improperly established.

In its petition for review, the agency asserted that the action at issue was not a reduction-in-force action, but was a reassignment effected under the authority of 5 C.F.R. 335.102. The agency argued that new evidence on this point is available, specifically, a corrected SF-50, Notification of Personnel Action Form, which was allegedly sent to the presiding official on July 27, 1979. The Board cannot agree that this "new evidence" was not available when the record was closed. 5 C.F.R. 1201.115(a). From its first contact with the agency, on June 27, 1979, the field office identified the matter at issue as an appeal from a reduction-in-force action. The Board finds that during the pendency of the appeal the agency had considerable opportunity to submit evidence or argument concerning this matter. Accordingly, the Board holds that, with due diligence, the evidence submitted with the petition for review could have been made available to the presiding official before the record was closed. The agency's petition for review on the basis of new evidence is, therefore, DENIED.

Despite the above determination, the Board has reviewed the record and has decided, on its own motion, to REOPEN the case. 5 C.F.R. 1201.117.

Upon reconsideration, the Board finds that, with the exception of a notation on the standard Form 50, Documentation of Personnel Action, which was sent to the presiding official, no other evidence in the record supoprts the determination that the respondent's reassignment was effected by application of reduction-in-force procedures. To the contrary, the evidence shows that at all times prior to the preparation of the erroneous SF-50 the agency followed procedures for effecting the appellant's reassignment under authority of 5 C.F.R. 335.102. Accordingly, the Board finds that the presiding official erred in determining that the respondent was reassigned by reduction-in-force procedures.

The action of an agency reassigning an employee without loss of grade or pay under 5 C.F.R. 335.102 is not appealable to the Board. *Crary v. Federal Aviation Administration,* 1 MSPB 438 (1980).

The initial decision is hereby VACATED, and the appeal DISMISSED because the appellant was not affected by a matter within the Board's appellate jurisdiction.

This is a final order of the Merit Systems Protection Board in this appeal.

Respondent is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES L. LAURSEN
v.
VETERANS ADMINISTRATION

Docket No.
AT075209025

OPINION AND ORDER

The appellant was employed as a Supervisory Pharmacist for the Veterans Administration (VA). He received a notice of proposed removal dated June 7, 1979, charging him with improper use of government property, improperly dispensing drugs, allowing unauthorized individuals access to the dispensing area of the pharmacy, and unauthorized use of government franked mail. The appellant was removed effective July 13, and filed an appeal to the Atlanta Field Office. In the appeal, the appellant disputed the merits of the case and contended that the agency failed to prove any allegations by a preponderance of the evidence. He also alleged harmful procedural errors under 5 C.F.R. 1201.56.

A hearing was held and the presiding official sustained the charges that the appellant dispensed drugs without prescriptions, that appellant mailed prescription drugs to an individual in another State, and that appellant allowed unauthorized individuals access to the pharmacy. Therefore, he affirmed the agency action.

The petition for review contended that the decision of the presiding official was based on an erroneous interpretation of statute and regulations under 5 C.F.R. 1201.115 and renewed the procedural and substantive arguments previously submitted. The agency's response requests denial of the petition for review but requests that if the petition is granted, the Board review the presiding official's decision not to consider the appellant's statements to investigating officers.

The record reflects that an investigation of the appellant's conduct was prompted by an anonymous phone call. As a result, the appellant's supervisor was interviewed and sworn statements were taken from the appellant and two clinic employees. In his statement, the appellant admitted the charges.

When the three sworn statements were taken, each deponent was told that "you may not be subjected to any retaliatory measures for giving testimony during this investigation." The agency relied on all of the statements in its decision to remove the appellant.

Because the agency warning was ambiguous, we will not disturb the decision of the presiding official not to consider the appellant's statement and we will not consider that statement in our review.

Because of the importance of a warning which clearly advises a deponent of his constitutional rights but also warns that questions must be answered and that a deponent may be subjected to disciplinary action for such answers, it may be appropriate to suggest that a warning such as is found in footnote four of *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 426 F.2d 619, 621 (2d Cir. 1970), *cert. den.*, 406 U.S. 961, 92 S. Ct. 2055 (1972) be revised to suit cases such as this.

The petition for review contends the presiding official made an erroneous interpretation of the Board's regulations in his decision to sustain Charge I(b). The petition contended that the burden of proof as required by section 1201.56 of the Board's regulations was not met. That charge alleges that the appellant:

> Dispensed prescription drugs to clinic employees, members of their families, and volunteers without valid physician's prescriptions. In at least one case phenobarbital, a controlled drug, was dispensed without a prescription. In cases involving volunteers, Dilantin and other drugs were dispensed and no record was made to support their issuance.

As we previously stated, because of the ambiguous warning, we cannot sustain elements of this charge which are supported only by the appellant's statement. Based upon the statements of the other two employees who were questioned by the investigating officers, only one element of this charge remains: that the appellant dispensed prescription drugs to clinic employees without valid physician's prescriptions. In order to sustain this element of this charge, it must be supported by a preponderance of the evidence.

One employee, Mr. William Head, testified that the appellant had dispensed drugs to employees but obtained prescriptions for the drugs after they had been dispensed. Mr. Darrell Lawrence, the other employee questioned, testified that employees got drugs from the pharmacy for their own personal use without having seen a doctor, but he was unable to give any specific names and did not indicate that these were prescription drugs.

The appellant is not charged here with dispensing drugs before obtaining prescriptions or of failing to follow proper procedures. The testimony of Messrs. Head and Lawrence was without specificity sufficient to support the charge by a preponderance of the evidence. Therefore, we reverse the decision of the presiding official and do not sustain this charge.

Charge II(c) alleges that the appellant mailed drugs to an individual in another state. The petition for review again asserts that the charge was not supported by a preponderance of the evidence and, therefore, the decision of the presiding official was based on an erroneous interpretation of section 1201.56 of the Board's regulations.

We find that this charge is supported by a preponderance of the evidence and we affirm the presiding official's decision regarding this charge.

The petition for review objects to the sustaining of Charge III, which was not within the jurisdiction of the Board because it had not been sustained by the agency.

A reading of the initial decision, which is consistent with the evidence, indicates that the presiding official inadvertently sustained Charge III, when obviously he intended to sustain Charge IV, that the appellant used VA franked mail containers to mail drugs to an employee's relative in another state. The appellant has submitted arguments to this charge in his answer to the proposed removal, appeal tc the field office and in written closing arguments after the hearing.

We find that this charge is supported by a preponderance of the evidence and we sustain this charge.

The appellant has alleged, in his petition for review and in his previous submission, that the agency failed to state a cause of action, that the final action was not in accordance with the proposed action, and that evidence was not made available to the appellant. He characterized these as harmful procedural errors. The presiding official found that the burden was not met regarding these allegations of harmful errors.

In a recently decided case, *Parker v. Defense Logistics Agency*, 1 MSPB 489, 493 (1980), the Board set forth its interpretation of the application of the harmful error standard. We said ". . . the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, tne decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error."

Although the *Parker* decision was issued after the initial decision, the presiding official discussed and analyzed these claims within the standards we have set in *Parker*. We agree that the appellant did not meet the burden to prove the affirmative defense of harmful error.

Accordingly, the petition for review is GRANTED. The initial decision is hereby REOPENED. Although we cannot sustain Charge I(b) because of the seriousness of Charges II(c) and IV, (see Transcript at 117) we AFFIRM the decision of the presiding official as modified to sustain the action of the agency.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review may be filed in the appropriate U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES MCLAUGHLIN
v.
DEPARTMENT OF THE INTERIOR

Docket No.
DC075299079

OPINION AND ORDER

Appellant, an Air Tool Operator with the National Park Service, Washington, D.C., was removed from the service for "excessive absence without leave." The removal arose out of a fitness-for-duty examination. The report of the examining physician stated that the appellant was not disabled and recommended that he return to his regular duties. Subsequently, the agency directed that appellant return to duty on January 29, 1979. Appellant did not report as directed, although he informed the agency on January 30, 1979, that he would return to work on February 5, 1979. Appellant, however, did not report for work until April 16, 1979.

Appellant replied to the advance notice of proposed removal and submitted a doctor's certificate which stated that he was under medical care from February 26 through April 2, 1979, and that he was fit to return to light duty. In addition, documents were submitted indicating that appellant, who was injured on the job and had been disabled since June 1977, was no longer considered totally disabled for work by the Department of Labor, Office of Worker's Compensation Program, effective March 28, 1979.

Appellant appealed his removal to the Washington, D.C. Field Office of the Merit Systems Protection Board. The presiding official found that the charge of excessive absence without leave was supported by a preponderance of the evidence and that removal would promote the efficiency of the service. In addition, the presiding official found no support for appellant's allegation of racial discrimination. Appellant now seeks review of the initial decision by the Board through a petition for review.

Appellant contended in his petition for review that there was a procedural error during his oral reply to the agency's proposed action. Appellant stated that he was not represented at the oral reply, even though he was accompanied by a union official, because he appeared at the agency office for a purpose other than to make an oral reply. However, the presiding official found that appellant did meet with agency representatives for the purpose of making an oral reply, and the Board agrees with his analysis. Assuming therefore that the union official was not prepared to fully represent appellant at that time, it was incumbent upon appellant or the union official to request a postponement of the oral reply. The record does not evidence such a request, and appellant does not contend he made such a request in his petition for review. Accordingly, no procedural error is found.

Appellant also contended that the fitness-for-duty report was incomplete because a full history was not taken of his mental condition. This argument, however, merely restated evidence which was before the presiding official. No documentation was given or statement made by the appellant to the agency regarding his condition which would have indicated to the agency that the report was incomplete. The Board finds no error in this connection.

Appellant's third contention was that the testimony of the agency's Chief of Employee and Labor Relations and of an employee relations specialist should have been stricken by the presiding official for failure to produce existing written statements relevant to their direct testimony. Specifically, appellant referred to section 1201.64 of the Board's regulations which provides, in pertinent part:

> After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual which is relevant to the evidence given. If the party refuses to furnish the statement, the relevant evidence given, may be excluded from consideration. 5 C.F.R. 1201.64.

The written statements at issue concerned information and documents which were initially part of a workmen's compensation file and which incorporated fitness-for-duty information. Some of this information was contained in the adverse action file upon which the removal was based.

The record shows that appellant introduced exhibits contained in the compensation-fitness file at the hearing held on August 9, 1979, and that he had the opportunity to examine the agency witnesses regarding any relevant document or report which the agency possessed concerning its efforts to secure medical information. Thus, appellant had access and sufficient opportunity to ascertain what material evidence the agency had. Accordingly, the Board finds that the presiding official properly allowed and considered the testimony of the agency witnesses.

In connection with his petition for review, appellant has submitted additional material which he alleges is new and material evidence in the form of medical reports. These reports concern an injury as a result of an auto accident which occurred two days before the appellant was directed to report for duty. The record shows that appellant must have been aware prior to the hearing that the issue of his medical condition might be material. In his letter of May 10, 1979, to the field office, he stated that one of the issues at the hearing would be his condition. More important, however, is appellant's acknowledgement in his petition that no mention of the history or treatment surrounding the January 1979 auto accident was made at the hearing because he did not want to prejudice his compensation case. In light of the foregoing, the Board finds that the medical reports submitted by appellant do not constitute new and material evidence that was unavailable, under the provisions of 5 C.F.R. 1201.115(a).

Finally, appellant contended that he was under medication which affected his mental reasoning during the hearing. Assuming this to be true, appellant's temporary incapacity should have been brought to the attention of the presiding official by appellant's attorney, who demonstrated familiarity with the case and careful preparation. Neither appellant nor his attorney requested a postponement or recess. Moreover, appellant's attorney has not claimed that appellant's testimony was incorrect, or that it would have been materially different had appellant not been under medication.

The Board concludes, therefore, that appellant has not established that the decision of the presiding official is based on an erroneous interpretation of statute or regulation, or that new and material evidence is now available that was unavailable when the record was closed despite his due diligence, as required by 5 C.F.R. 1201.115. Accordingly, the petition for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for review of the decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LOYD J. PARTON
v.
DEPARTMENT OF THE ARMY

Docket No.
DA035199007

OPINION AND ORDER

By letter dated September 8, 1979, the appellant petitioned the Board for review of the August 22, 1979 decision of the Board's Dallas Field Office which sustained the action of the Department of the Army in separating him by reduction in force (RIF). On June 25, 1980, the Board reopened this case to give the parties an opportunity to address two issues: (1) whether petitioner's retirement was based on a disability so as to make him a preference eligible within the meaning of 5 U.S.C. 3501;[1] (2) assuming that the Field Office finding that petitioner was not entitled to veterans preference was erroneous, was he harmed? In considering the first issue, the parties were also asked to examine whether the Board may from the facts of a particular case determine that a person retired because of a disability and therefore is such a preference eligible or whether it must abide by the retirement designation made by the Army.[2] Also, if the Board is bound by the Army's designation, may the petitioner request a change in status to a type of retirement that would satisfy the requirements of Section 3501. The Office of Personnel Management (OPM), as an intervenor, filed a brief addressing those issues.

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[1] 3501(a): (3) a preference eligible employee who is a retired member of a uniformed service is considered a preference eligible only if—(A) his retirement was based on disability—(i) resulting from injury or disease received in line of duty as a direct result of armed conflict; or (ii) caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38; (B) his service does not include twenty or more years of full-time active service, regardless of when performed but not including periods of active duty for training; or (C) on November 30, 1964, he was employed in a position to which this subchapter applies and thereafter he continued to be so employed without a break in service of more than 30 days.

[2] For the purposes of this opinion, use of the term Army refers to Department of the Army as a division of the armed forces and use of the term Department of the Army refers to the Department of the Army as an agency employing civilian personnel.

STATEMENT OF THE FACTS

Appellant retired from the Army on August 31, 1974, and was employed by the Department of the Army in a civilian capacity in 1977. His employment was terminated on June 25, 1979, due to RIF. He did not receive retention preference during the RIF because his military retirement was not based on disability as required by 5 U.S.C. 3501 (a) (3) (A), and he had served more than twenty years (5 U.S.C. 3501 (a) (3) (B)). Appellant stated during the hearing and in his brief that he did not retire from the Army due to disability, but, that upon his application, he did receive from the Veterans Administration (VA) disability compensation. He has contended that this disability entitles him to retention preference. The presiding official determined that appellant was not entitled to such preference because he did not satisfy the requirements of 5 U.S.C. 3501 (a) (3) (A) and (B).

ANALYSIS

The Department of the Army in its brief has stated that the only authorized procedure for retiring from the Army because of disability is through a physical examination and a subsequent determination by a Disability Evaluation Board that the service member is physically unfit for further service due to the disability. The Department of the Army has argued that the Board cannot make a determination that appellant did retire for disability in contravention of the actual facts and applicable regulations and statutes. OPM has asserted that the Board does not have any independent authority to review the Army retirement classification. C.f., *Johnson v. Alexander*, 572 F.2d 1219, 1224 n.5 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978), *rehearing denied*, 439 U.S. 1135 (1979), which distinguishes between "military departments" and "armed forces" and makes determinations of the former, though not the latter, subject to review in accordance with the standards of Title VII of the Civil Rights Act of 1964.

Appellant has asserted that the Board can review the retirement determination. Basically, he has argued that since he is receiving disability compensation from VA, he is, therefore, disabled for purposes of 5 U.S.C. 3501 (a) (3) (A). The Army and the Veterans Administration, however, apply different standards and procedures to evaluate a veteran's disability status. For example, Section 1201 of Title 10 of the United States Code, governing the disability retirement of military personnel, requires that the disability be based on accepted medical principles and be permanent in nature. The Veterans Administration will presume that a veteran incurred a service-connected injury if such a presumption is consistent with conditions surrounding his or her service, even though there is no official record of the occurrence. 38 U.S.C. 354. Further, retirement classification cases have held that the armed forces (Army in this case) need not confer retirement based on disability status simply because the Veterans Administration determines that a military retiree has a service-connected disability. *See Unterberg v. United States*, 412 F.2d 1341, 188 Ct.Cl. 994 (1969); *Bennett v. United States*, 200 Ct.Cl. 635, 644 (1973).

The Army has stated that a physical examination must be taken before retirement based on disability is considered. Appellant has stated that he retired from the Army without taking a physical examination. Thus, appellant did not request the Army to make a determination on his disability, and therefore, must have retired from the Army for reasons other than disability. The Army has indicated that he may request a change in this status, if he wishes.

The Department of Army as the civilian employer of appellant did not make a retirement designation per se. It simply examined the Army's retirement designation and appellant's length of military service to make a determination of his retention preference under 5 U.S.C. 3501. See the agency's letter to the field office dated June 14, 1979. Given the circumstances, the Department of the Army determined that appellant had to be classified as a Subgroup II-B, career-conditional employee without veterans preference for purposes of the RIF.

The Board has appellate jurisdiction over certain decisions of the Office of Personnel Management relating to retirement. 5 C.F.R. 1201.3. However, this case involves a retirement designation made by the military, specifically the Army. The parties have pointed to no statutory or regulatory provision which gives the Board authority to review retirement determinations of the Army and our research has disclosed none. This in no way implies a limitation on the Board's authority to examine the circumstances of the RIF over which it does have appellate jurisdiction. Consequently, the Board properly required the Department of Army to establish how it determined the appellant's classification for the RIF, and properly reviewed that determination to assure that appellant was accorded his rights during the RIF. Having considered the evidence of record, however, we do not find the authority to go behind the Army determination on which the civilian agency relied. There is no evidence in the record to suggest that appellant was not accorded a full and fair opportunity to seek a disability retirement from the Army at the time of his discharge from the armed forces. *Cf. Laverne Chisholm v. Defense Logistics Agency*, 3 MSPB 273 (1980).

Given appellant's military retirement status and his twenty years service, the presiding official did not err in finding that he did not qualify for veteran's preference under 5 U.S.C. 3501. The Department of Army has indicated that if appellant had veterans preference there would have been a different offer of employment. But, given the facts in this case, only an action by the appellant in seeking reclassification of his military retirement could have opened this door. Statements in his brief would indicate that he did not wish to pursue this course.

Having reviewed the record pursuant to the reopening, the Board finds that the conclusions of the presiding official were correct. Nothing in appellant's petition for review shows error in those determinations. Accordingly, the initial decision is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELLIS WALKER, JR.
v.
VETERANS ADMINISTRATION

Docket No.
DC075209232

OPINION AND ORDER

The appellant was removed from his position based upon charges of AWOL and sleeping on duty. His past disciplinary record was cited in support of the removal action. He appealed the decision, but did not request a hearing. The agency's request for a hearing was denied by the presiding official on the basis that the facts could be fully developed by the submission of written evidence and argument.[1]

The presiding official found the charges to be sustained by a preponderance of the evidence and that the removal action would promote the efficiency of the service.

In his appeal to the field office the appellant alleged, *inter alia*, that his removal was taken in reprisal for his successful appeal of a previous removal action (DC752B90197). Section 1201.111(b) (1) of Title 5, Code of Federal Regulations, requires each initial decision to contain findings of fact and conclusions, as well as the reasons therefor, upon all material issues of fact and law presented on the record. However, the initial decision fails to address the reprisal issue or to make findings thereon. *See Gipson v. Veterans Administration*, 1 MSPB 420 (1980).

In his petition for review the appellant also argues that the presiding official's refusal to give his written statements of explanation for his absences probative value constituted an erroneous interpretation of statute or regulation. We agree.

The presiding official found that the appellant's explanations were of no probative value because "his statements were neither made under oath nor subject to cross-examination." However, as no hearing was held on the appeal, none of the evidence in the record, including the agency's submissions, was submitted under oath or was subject to cross-examination.

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[1] The Board has previously noted that the discretion of its presiding officials to grant a hearing at the agency's request, 5 C.F.R. 1201.25(b), should be "liberally exercised" because "a hearing can normally be expected to provide a more adequate basis for Board decisions." *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

Although an appellant is entitled by law to a hearing on his or her appeal (*see* 5 U.S.C. 7701(a)(1) and 5 C.F.R. 1201.24(c)), this right may be waived by the appellant. The Board's regulations provide that he or she may elect instead to have the determination of the appeal based on the record. *See* 5 C.F.R. 1201.24(c). In the instant case the appellant chose to waive his right to a hearing and to have the decision based upon the record.

By rejecting the appellant's statements of explanation for the reason that, as they were not made under oath and subject to cross-examination, they were of no probative value, the presiding official, in effect, denied the appellant his right to due consideration of his affirmative defenses to the action taken by the agency. *See* 5 U.S.C. 7701(c)(2) and 5 C.F.R. 1201.56(b).

Accordingly, because the presiding official erred in processing the appeal by failing to consider and rule on the issue of reprisal and to give appropriate consideration to the appellant's statements in defense of his actions, we hereby GRANT the petition for review and upon reopening, VACATE the initial decision and REMAND the case for a new determination consistent with this opinion.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 14, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARLOS AVILA
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA075209005

OPINION AND ORDER

Appellant was removed upon the expiration of his two-year Veterans' Readjustment Appointment (VRA),[1] for failure to meet the satisfactory attendance, conduct and performance requirements so as to make him eligible for conversion to career conditional employee.

The presiding official of the Board's Dallas Field Office affirmed the removal. Appellant filed a petition raising again matters which he had raised on appeal.

We find that the petition contains no basis warranting the Board's complete review of the record. Each of the contentions comprising the petition was fully adjudicated by the presiding official, and appellant has demonstrated no error in his conclusions. Appellant's disagreement with the presiding official's conclusions is an insufficient basis for our review of the initial decision, under the regulatory criteria contained in 5 C.F.R. 1201.115.[2]

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 17, 1980*

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[1] *See* 5 C.F.R. Part 307; *also*, Chapter 307 of the Federal Personnel Manual.

[2] *See Claude Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES BATTAGLIA
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
NY531D09010

ORDER

By petition under 5 C.F.R. 1201.115 (1979), James Battaglia, appellant, seeks Board review of the initial decision issued on March 13, 1980, which dismissed his appeal without prejudice.

Appellant was denied a within-grade salary increase based on the agency's determination that he was not performing at an acceptable level of competence. Thereafter, and following the agency's reconsideration decision sustaining the negative determination, appellant appealed the action to the Board's New York Field Office. In the initial decision, the presiding official found that the appeal was prematurely filed because appellant had previously filed a discrimination complaint within the agency on the appealable matter, and the agency had not issued a decision on the complaint, nor had 120 days elapsed. The Board's regulations at 5 C.F.R. 1201.154 (1979), implementing 5 U.S.C. 7702(a)(2), provide that the Board can accept such appeals only if the conditions cited therein and quoted in the initial decision, prevail.

The petition for review takes exception to the date, December 6, 1979, relied upon by the presiding official in computing the 120-day period. The Board notes, however, that as appellant refiled the appeal with the New York Field Office, and as a decision on the merits was issued by the Field Office on August 5, 1980, from which there is now pending a separate petition for review, the passage of time and events have rendered the issue in this petition moot. *Richardson v. U.S. Department of Labor*, 1 MSPB 554 (1980).

Accordingly, the petition for review is hereby DENIED.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD DESIDERIO
v.
U.S. DEPARTMENT OF THE NAVY

Docket No.
PH07528010036

OPINION AND ORDER

Appellant, an employee of the Philadelphia Naval Yard, was dismissed March 21, 1980 for unsatisfactory attendance based on 356 hours of leave without pay in 1978 and 461 hours of leave, of which 331 hours were unauthorized in 1979. The presiding official sustained the agency action on July 25, 1980.

In the petition for review it was asserted that the initial decision was procedurally defective since the record did not establish that appellant's removal promoted the efficiency of the service. As clearly set forth by the presiding official, unauthorized absence from duty has been held to be proper grounds for removal since by its very nature it disrupts the efficiency of the service. See *Chiaverini v. U.S.*, 157 Ct. Cl. 371 (1962); *Ruben v. U.S.*, 150 Ct. Cl. 28 (1960); *Chiriaca v. U.S.*, 235 F. Supp. 850 (N.D. Ala. 1963) *aff'd* 339 F.2d 588 (5th Cir. 1964). The record contains evidence clearly establishing appellant's absences and assertions that such absences increased administrative costs and decreased productivity. Therefore, there is no basis to conclude that the presiding official erred in determining from the evidence presented that appellant's removal promoted the efficiency of the service.

Appellant also asserted that he was discriminated against because he was handicapped. Pursuant to 5 C.F.R. 1201.155, an allegation of discrimination may be raised to the Board during the pendency of the action. We note that appellant was discharged from service in Viet Nam in 1969 with a compensable disability due to injuries to his right arm. However, appellant testified that stomach disorders allegedly resulting from Viet Nam trauma was the basis of his absences. He did not submit additional information in his petition for review. Since appellant's Viet Nam disability and subsequent medical problems were thoroughly discussed and explored at the hearing before the presiding official, we find this allegation of discrimination not only untimely, but also repetitious of evidence already presented in the record and, as such, this allegation cannot and does not constitute new evidence.

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The petition for review asserted that appellant is entitled to the benefits of Executive Order 5396 which provides for authorized leave for medical treatment necessitated by wartime injury. See also FPM Supplement 990-2, Chapter 630, Subchapter S1-4, November 15, 1976. Executive Order 5396 is clearly inapplicable to the instant case inasmuch as appellant at no time received treatment for his injured right arm. Moreover, even if appellant's stomach problems were determined to be a service-related disability, appellant did not fulfill even the minimal procedural requirements for obtaining leave, namely presenting an official statement from a duly constituted medical authority concerning his medical treatment and giving his employer prior notice of the date and time of his absences. In summary, the authorization of leave without pay is a matter of administrative discretion. Employees cannot demand that they be granted leave without pay as a matter of right. FPM Supplement 990-2, 630-55, Subchapter S12-2, May 19, 1969. Therefore, the agency was acting within the bounds of discretion and authority when it denied appellant leave without pay.

Finally, appellant in the petition for review asserted his condition has improved and he is able to return to his former position. However, at the time of removal, the agency did not know appellant's condition could be remediated or that he would ever be a fully productive, dependable employee. Prolonged absence with no foreseeable end is deemed to be just cause for removal. *J. C. McKenzie v. U.S. Postal Service,* 1 MSPB 480 (1980). Therefore the agency did not abuse its discretion in terminatnig appellant nor did the presiding official err in affirming the agency decision.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

James C. Garrison
v.
U.S. Postal Service

Docket No.
AT075299068

Opinion and Order

Appellant timely filed a petition for appeal with the Board's Atlanta Field Office from the action of the U.S. Postal Service, removing him from his position as Mail Handler, effective May 19, 1979, with the agency's Bulk Mail Center, Greensboro, North Carolina. Appellant was charged with "Excessive Unscheduled Absences," from his scheduled tour of duty from September 6, 1978, through March 6, 1979, on twenty-one specified dates and hours. Appellant was also charged with "Absence Without Leave" in that his requests for sick leave on November 4, 5, 20, and 29, 1978, were subsequently disapproved by the agency, and that his requests for military leave to cover absences on September 23 and 24, 1978, and October 28 and 29, 1978, were subsequently disapproved for failure to provide documentation of his military duty. The notice of charges also informed appellant that two prior warnings for unsatisfactory attendance and one prior suspension of fourteen days for sleeping on duty would be considered in determining the disciplinary action to be imposed if the charges were sustained.

Appellant failed to timely answer the notice in person or in writing and by letter of decision dated May 7, 1979, the manager of the agency's Bulk Mail Center found that the charges were sustained and that, having also considered the appellant's prior record of conduct, his removal would promote the efficiency of the service.

Appellant's petition for appeal alleged that all of appellant's absences were approved by his supervisors and were in accordance with the agency's leave policy. A hearing was not requested and the matter was determined based on the record. The presiding official found, in his initial decision dated September 12, 1979, that the agency's approval of thirteen of the twenty-one instances of unscheduled absences cited in the notice of charges acted to condone those absences and they could not be used as a basis for the charge of "Excessive Unscheduled Absences."

The instances of "Absence Without Leave" on September 23 and 24, 1978, and October 28 and 29, 1978, were found sustained by a preponderance of the evidence as appellant's requests for military leave by PS Form 3971 (Request For, or Notification of, Absence) reflected that they were disapproved for lack of certification of performance of military duty. The presiding official also found that the agency was justified in disregarding two certificates endorsed by the appellant's commanding officer in the Army Reserve which he submitted on June 12, 1979, in an attempt to document his military absences over a month after he was notified of the decision to effect his removal.

The presiding official, additionally, found that the instances of "Absence Without Leave" on November 4, 5, 20 and 29, 1978, were sustained by a preponderance of the evidence as appellant had failed to document his illness to the agency.

He concluded that these eight instances of absence without leave sustained the charge of "Excessive Unscheduled Absences" and that, as appellant had previously received warning letters for his absences, the removal action was warranted. Accordingly, he sustained the removal action.

A petition for review was timely filed with the Board by appellant and his representative. The petition attempted to present additional evidence which was not presented before the presiding official and argued that the removal was effected as a result of harmful procedural error by the agency. The petition also posited that the presiding official erred in finding that appellant was required to provide documentation to substantiate his claim of illness in order to obtain sick leave.

The agency has not filed a response to appellant's petition for review.

Upon examination of the record and the petition for review, the Board finds that appellant's assertions that additional evidence should be considered and that his removal was effected as a result of harmful procedural error can be answered expeditiously. Appellant's petition does not establish that, despite due diligence, the proposed evidence of his alleged inability to obtain military documentation for his absences and of the alleged grievance hearings, was not available when the record was closed. 5 C.F.R. 1201.115 (a).

Additionally, while appellant asserted that his absences of September 23 and 24, 1978, and October 28 and 29, 1978, constituted excusable military leave under agency policy, the record reveals that appellant's supervisor filed an affidavit with the Field Office on July 2, 1979, attesting that he informed appellant prior to and after these absences that his requests for military leave on those dates would not be approved unless he furnished documentation of his military duty. Section 517.21 of the agency's *Employee & Labor Relations Manual* (October 18, 1978), which constitutes a part of the record provides that the official responsible for approving the attendance record of an employee of the agency also approves military leave. Pursuant to Section 517.22, the employee is to furnish a copy of his properly endorsed military orders to the agency to show the duty was actually performed. Appellant failed to provide the agency with any documentation to verify his Army Reserve service even though his supervisor attested that he requested documentation and even though appellant was afforded the opportunity to provide such documentation in answer to the notice of charges issued on April 6, 1979, and before the issuance of the notice of removal, effective May 19, 1979. The presiding official found that appellant's subsequent submission on June 12, 1979, of certificates endorsed by his commanding officer was an untimely attempt to excuse his absences, and the Board does not conclude that he erred in so finding under these circumstances. *See Chiaverini v. United States*, 157 Ct. Cl. 371, 375 (1962).[1]

Similarly, appellant's assertion that he was not required by agency procedure to document his requests for sick leave on November 4, 5, 20 and 29, 1978, does not find support in the agency's *Employee & Labor Relations Manual*, Section 513.412.361 (October 18, 1978). Section 513.412.361 provides that the agency's supervisors may accept the employee's statement explaining his sick leave absence of three days or less, but that medical documentation or other acceptable evidence is required when the employee is on restricted leave or "when the supervisor deems documentation desirable for the protection of the interests" of the agency. Appellant's supervisor stated in his affidavit that he informed appellant that his requests for sick leave were denied for failure to document his illness. Appellant did not subsequently provide the agency with documentation for his illness when he was afforded an opportunity to answer the notice of charges dated April 6, 1978, nor did he provide any documentation for his absences to the presiding official. The agency's charge of absence without leave for the four days claimed as sick leave was a proper application of its procedures.

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[1] In *Chiaverini*, where a Naval civilian employee who absented himself from work for more than two months because of a cold and ignored the agency's request that he furnish a doctor's certificate, produced such a certificate only after he returned to work, the agency's notice of proposed removal issued prior to the employee's return to work was held not to be arbitrary or in violation of agency regulation. The employee's failure to communicate with the agency during his absence and to submit the medical certificates required of him at the proper times was ample reason to sustain the removal action.

Appellant has not sustained his burden of showing harmful error in the application of the agency's procedures in arriving at its removal decision. 5 U.S.C. 7701(c)(2)(A); 5 C.F.R. 1201.56(b)(1). Nor does his petition for review establish that new and material evidence is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115.

Accordingly, the petition for review of the initial decision of the presiding official is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

YOULINE HALE, ET AL.	
v.	Docket No.
DEPARTMENT OF THE AIR FORCE	DA075209236

OPINION AND ORDER

Each of the petitioners was changed to lower grade as a result of the reclassification of their positions by the agency. They appealed the action to the Board's Dallas Field Office where the presiding official dismissed their appeal as not within the jurisdiction of the Board. The basis for the dismissals of their appeal was that the petitioners, having received grade and pay retention benefits to which they were entitled under the provisions of the Civil Service Reform Act of 1978, had no right of appeal to the Board.

The Board recently addressed the issue of the extent to which 5 U.S.C. 5366 limits rights of appeal that might otherwise be available under 5 U.S.C. 7512 in the case of *Atwell v. Department of the Army,* 3 MSPB 8 (1980). In that case, the Board concluded that "employees who continue to be assigned to positions which are reclassified downward, and who receive the benefits of 5 U.S.C. 5362 and 5363, may not appeal to the Merit Systems Protection Board from either the reclassification of the position or the reduction in grade and/or pay which, but for the grade and pay retention provisions of the Civil Service Reform Act, might otherwise have been appealable. Employees under such circumstances may still vindicate their statutorily granted rights through a classification appeal directed to OPM." [1]

Accordingly, the initial decision of the presiding official did not involve an erroneous interpretation of statute or regulations, and it is hereby Ordered that the petition for review be DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

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[1] An action which is the basis for grade and pay retention benefits may be appealed to the Board in one circumstance, which is not relevant to the instant appeal: where the retention benefit rights arose as a result of a reduction-in-force action taken by the agency under 5 C.F.R. Part 351. *See* 5 U.S.C. 5266(a)(2)(B).

Appellants are hereby advised of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HOWARD E. MANSFIELD
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
SL531D09001

OPINION AND ORDER

Petitioner was denied a within-grade increase for failure to perform at an acceptable level of competence (ALOC). The negative ALOC determination was upheld by the agency on reconsideration. On appeal to the St. Louis Field Office of the Board, the presiding official found that the agency's negative determination and reconsideration decision were supported by a preponderance of the evidence.

The Board may grant a petition for review which meets the regulatory criteria set forth in 5 C.F.R. 1201.115. The appellant's petition for review, not meeting the criteria, is hereby DENIED. However, the Board finds that, although not specifically alleged by petitioner, the decision of the presiding official was based on erroneous interpretation of law.

Pursuant to 5 U.S.C. 5335, employees in permanent General Schedule positions are entitled to periodic within-grade step increases in salary if their work is "of an acceptable level of competence." In *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980), the Board held that the correct standard of proof governing the agency's determination that an employee's performance has not been acceptable is the substantial evidence standard. See 5 U.S.C. 7701(c)(1)(A). Since the presiding official found that the agency's negative ALOC determination and reconsideration decision were supported by a preponderance of evidence, the presiding official's decision was based on an erroneous interpretation of law. See 5 C.F.R. 1201.115(b).

Because, however, the presiding official held the agency to a higher standard of proof than that required by law, petitioner thereby suffered no resulting prejudice to his rights. Consequently, it would serve no useful purpose to remand the case to the presiding official on that ground. Further, a scrutiny of the record indicates that, at the hearing, substantial evidence was presented, in the form of testimony and exhibits, to support the agency's negative ALOC determination.

Accordingly, consistent with this Opinion, the initial decision is hereby REOPENED, MODIFIED in its analysis and AFFIRMED in its conclusion.

This is the final decision of the Merit Systems Protection Board. Petitioner is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided appeal is filed within 30 calendar days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., ***November 17, 1980***

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHARON A. MARTIN
v.
DEPARTMENT OF THE ARMY
RESERVE COMPONENTS PERSONNEL
AND ADMINISTRATION CENTER

Docket No.
SL075209056

OPINION AND ORDER

Appellant appealed the action of the Department of the Army whereby she was demoted from her position of Military Personnel Management Specialist, GS-7, to her former position of Editorial Assistant, GS-5. The agency took such action because it believed appellant had not met the specialized experience requirements of Office of Personnel Management Handbook X-118 concerning the GS-7 position.

At the hearing, appellant, who had an 8-year history of outstanding performance ratings, presented testimony and affidavits of seven supervisors and coworkers, all of whom testified to appellant's experience and good performance in personnel-related matters. These witnesses individually and collectively supported appellant's assertion that she had in fact acquired the specialized experience necessary to fill the GS-7 position.

The agency presented no evidence refuting either appellant's qualifications or her successful performance during the seven-month period in which she occupied the GS-7 position. It must be concluded that the agency did not establish by a preponderance of the evidence that appellant's demotion was for such cause as would promote the efficiency of the service. 5 U.S.C. 7513(a) and 7701(c)(1)(B).

Since the decision of the presiding official was based on an erroneous interpretation of statute or regulations, 5 C.F.R. 1201.115(b), appellant's petition for review is hereby GRANTED. The agency action is REVERSED and appellant shall be reinstated to the position of Military Personnel Management Specialist, GS-7, retroactive to February 17, 1980.

Evidence of compliance with this action ordered must be submitted to the field office within ten (10) days of the receipt of this Opinion and Order.

This is a final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than 30 days after respondent's receipt of this Order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ZANE E. MURPHY
v.
DEPARTMENT OF ENERGY

Docket No.
DC035109002

OPINION AND ORDER

Petitioner appeals his reduction-in-force on the grounds that the agency failed to follow proper reduction-in-force procedures, thereby denying him an assignment to an available position at his grade level to which he was entitled.

The presiding official held that the burden of proof of showing that the agency failed to afford petitioner all the rights to which he is entitled by the reduction-in-force regulations rested with petitioner. However, in *Losure v. Interstate Commerce Commission,* 2 MSPB 361 (1980), the Board ruled that the burden of proof is on the agency to support its reduction-in-force decision by a preponderance of the evidence. Therefore, the petition for review is GRANTED, and this case is REOPENED and REMANDED for new proceedings consistent with *Losure.*

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Thomas P. Parker
v.
Department of the Interior
Bureau of Land Management

Docket No.
SF075209084

Order

This case comes before the Board on appellant's petition for review of the presiding official's determination that appellant's removal for being absent without authorized leave was supported by a preponderance of the evidence and was taken for such cause as would promote the efficiency of the service. Appellant alleges that the presiding official failed to consider all material issues presented and affirmative defenses made in the case.

Appellant had asserted that the agency action was a result of physical handicap discrimination (allergies) and reprisal for filing a suit against the agency and his supervisors for exposing him to asbestos and tobacco smoke.

The presiding official, in this initial decision issued January 24, 1980, made detailed findings concerning the discrimination issue.[1] However, he neglected to address the reprisal charge.[2] Accordingly, appellant's petition for review is hereby GRANTED.

It is undisputed that appellant filed Civil Action No. S-79-312 in the U.S. District Court for the Eastern District of California on May 16, 1979. In his complaint, appellant alleged that the Bureau of Land Management and specified employees discriminated against him because of his physical handicap by exposing him to intensive asbestos dust inhalation, by exposing him to high levels of tobacco smoke in his work environment, and by failing to act satisfactorily on his informal Equal Employment Opportunity complaint.

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[1] The presiding official determined that appellant's actual work exposure to asbestos could not be accurately determined from evidence of record. He additionally found that the agency made substantial efforts to accommodate appellant's allergy condition, allegedly aggravated by tobacco smoke, including relocating his work site to improve air quality, prohibiting smoking in certain areas including appellant's work site, the conference room, library, and restrooms, and conducting scientific air analysis tests. (Initial Decision at 4.) He, accordingly, concluded that the evidence failed to disclose that the agency discriminated against appellant because of his physical handicap.

[2] The Board's procedural regulations at 5 C.F.R. § 1201.111(b)(1) states: "Each initial decision shall contain (1) findings of fact and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact and law presented on the record."

The agency decision to remove appellant may not be sustained if appellant shows that the decision to remove him was based on a prohibited personnel practice described in 5 U.S.C. § 2302(b). 5 U.S.C. § 7701(c) (2) (B). Since appellant filed a lawsuit against the agency, his claim arguably raises the affirmative defense that the agency violated 5 U.S.C. § 2302(b) (1), (8), or (9). If it can be proved that the personnel action was taken as a reprisal for appellant's exercise of an appeal right, then the agency action cannot be upheld.

However, the agency asserts that an intervening factor precipitated appellant's removal, namely that he refused to return to work despite the issuance of two letters of warning concerning his extended absence and ordering him to return to duty.

Appellant admits that he did not report for work but contends that his failure to do so was protected under the Occupational Safety and Health Act.

The Occupational Safety and Health Act of 1970 [hereinafter the Act], was promulgated to assure safe and healthful working conditions for all employees. However, the federal government is specifically excluded from the general terms of its coverage. 29 U.S.C. § 652(5). Section 19 of the Act contains special provisions to afford protection to federal employees by requiring the head of each agency to establish and maintain a safety and health program for its employees. 29 U.S.C. § 668. Executive Order No. 11807,[3] effective September 28, 1974, and 29 C.F.R. Part 1960 set out guidelines for executive agencies to follow in developing their programs. In his initial decision, the presiding official reviewed 29 C.F.R. Parts 1910 and 1960 and 41 C.F.R. § 101.20 (regulations pertaining to smoking in federal buildings) and concluded that they did not authorize a federal employee to withhold his services from his employer and still retain his employment.

Appellant, in all probability, is seeking to invoke the provisions of 29 C.F.R. § 1977.12(b) (2) which acknowledge that an employee may choose not to perform his assigned task if he reasonably believes that he is in danger of imminent serious bodily injury and if no less drastic alternative is available. Although this regulation has been upheld by the Supreme Court as valid when applied to private employers, *Whirlpool Corporation v. Marshall*, 444 U.S. 823, 100 S. Ct. 883 (1980), there is no authority which extends the benefits of this rule to the federal sector.

Nonetheless, for the purposes of this Opinion we will assume that a federal employee is protected by the concept enshrined in that regulation. Given that assumption, appellant still must present evidence which demonstrates that he reasonably believed his continued presence at his place of employment would result in his imminent death or serious injury.

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[3] Since superseded by Executive Order 12196, effective October 1, 1980.

Appellant has alleged that management's requirement that he work with asbestos in a laboratory setting was potentially dangerous to his health. However, the provisions of 29 C.F.R. § 1910.1001 governing the use of asbestos clearly do not prohibit an employee from working with the substance. Appellant has not asserted that the agency violated any of the conditions set forth in that section and, as such, we find appellant's reliance on the dangerous nature of asbestos unsupportive of his claim that he could justifiably remain away from work.

Appellant has also alleged that the presence of tobacco smoke warranted his removing himself from his work site. The findings of the presiding official regarding the discrimination issue are materially relevant here. The agency clearly attempted to resolve appellant's complaint that the air in his work environment was injurious to his health. Although appellant has unilaterally determined that agency accommodations were inadequate, there is no evidence which indicates that he invoked the less drastic remedy of requesting a safety inspection of the workplace or gave notice of alleged unhealthful working conditions to a designated health official pursuant to 29 C.F.R. § 1960.31. We must reject appellant's contention that the presence of a small amount of tobacco smoke allowed him to remain away from work. Appellant has simply presented no evidence that he was in immediate danger of death or serious injury.

Therefore, even if 29 C.F.R. § 1977.12 (b) (2) is applicable to the federal government as an employer, we find that under the circumstances of the instant case, appellant has no right which permits him to refuse to come to work without risk of reprimand or adverse action. Accordingly, the agency's action in considering appellant's AWOL was not violative of OSHA laws or regulations. Thus the agency has established a legitimate nondiscriminatory reason for its action removing appellant sufficient to rebut any claim that the action was in reprisal for the filing of the lawsuit. Unauthorized absence from duty has long been held to be proper grounds for removal since by its very nature it disrupts the efficiency of the service. *Chiaverini v. United States*, 157 Ct. Cl. 371 (1961) ; *Rubin v. United States*, 150 Ct. Cl. 28 (1960) ; *Chiriaco v. United States*, 235 F. Supp. 850 (N.D. Ala. 1963), *aff'd.* 339 F.2d 588 (5th Cir. 1964).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision is AFFIRMED as modified and shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM E. PARKER
v.
DEFENSE LOGISTICS AGENCY

Docket No.
PH531D09031

OPINION AND ORDER

Petitioner seeks review of the initial decision of the Defense Logistics Agency to withhold appellant's within-grade salary increase based on a negative determination of appellant's acceptable level of competence.

This case was reopened upon the Board's own motion on July 2, 1979. Submissions were received from the parties on the issues of proof of harmful error in the agency procedures, and what standard of proof should be applied in Board review of denial of within-grade salary increases. On February 19, 1980, the Board issued an opinion finding that there was no basis in the record for concluding that the two procedural errors found to exist were harmful, and that a "substantial evidence" standard should be applied in deciding appeals from a denial of a within-grade salary increase. The Board remanded the case to the Philadelphia Field Office for readjudication under the substantial evidence standard, allowing both parties to supplement the record in the case. The presiding official was also directed to address appellant's allegation that the agency action was a prohibited personnel practice.

The presiding official's subsequent initial decision which is being challenged by the instant petition for review carefully applied the substantial evidence standard as the Board had directed, and addressed the prohibited personnel practice allegation as the Board had instructed.

The petition for review asserts that new and material evidence is available. The Board has carefully considered this claim and made a thorough examination of the documents submitted with the petition. Many of the items are duplicates of documents already made a part of the extensive record developed in this case. Other documents accompanying the petition for review merely recite information already introduced into the record. All of the documents predate the present initial decision. To the extent the documents relied on in the petition for review are not merely duplicative of items already a part of the record, they are either part of agency records or are apparently from the personal files of appellant. Petitioner makes no claim that he exercised due diligence in seeking to obtain and submit the documents prior to the closing of the record. Nor is there any claim that any of the documents were withheld from petitioner by the agency. Indeed, many of petitioner's submissions are documents either sent or received by petitioner himself and no explanation is given as to why petitioner was unable to present the evidence before the record was closed.

For these reasons the Board finds that the documentation submitted by petitioner does not qualify as new and material evidence that was not available, despite due diligence, when the record was closed. 5 C.F.R. 1201.115(a).

Having fully considered the petition for review of the initial decision issued on July 3, 1980, the Board finds that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, and hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

VIRGINIA E. RHINEHART
v.
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
OFFICE OF HEARINGS AND APPEALS,
ST. LOUIS, MISSOURI

Docket No.
SL075209049

OPINION AND ORDER

Petitioner appeals her removal from her position as a GS-3 Clerk-Typist, claiming age discrimination. According to respondent agency, she was terminated during her probationary period, and therefore, has no right to appeal her removal on the grounds of age discrimination. 5 C.F.R. 315.806. According to petitioner, she was not serving a probationary period, and therefore the respondent committed harmful error by not affording her the procedural rights owing a nonprobationary employee upon notification of an adverse action. 5 C.F.R. 752. The presiding official found for petitioner, and, for the following reasons, we REVERSE.

Petitioner was selected for her position by respondent from a civil service register. On the Standard Form 50 issued by respondent, in Block 12, the words "Reinstatement-Career" appear, as well as code number "140," which refers to a reinstatement. In the area titled "Remarks," the box that would indicate that petitioner was hired subject to a one-year probationary period, was not checked.

However, four days later, respondent issued a corrected SF-50 indicating that petitioner was serving a one-year probationary period. Petitioner received a copy of the corrected form.

Nevertheless, the presiding official held that petitioner was not serving a probationary period and therefore had full appeal rights before the Board. We disagree.

It was within the discretion of the agency whether to hire petitioner off a register or by reinstatement. Employees hired off a register must serve a probationary period. 5 C.F.R. 315.801 (a) (1). Respondent has submitted its selecting official's statement to the effect that petitioner was hired competitively and was meant to serve a probationary period. (Statement of Ruth Dunham.) Although the first SF-50 did not mention a probationary period, a corrected SF-50 was issued four days later. The presiding official found that petitioner was aware of the corrected SF-50.

Therefore, any error that might have occurred was confined to the four-day period between the issuance of the two forms. The presiding official erred in finding that harmful error occurred in petitioner being removed as a probationer because, contrary to his findings, she was a probationer. The only error, that of issuing an incorrect SF-50, was corrected shortly thereafter, and, under our rule in *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), did not affect the result in this case, and therefore, cannot be considered harmful.

Petitioner being a probationer, the initial decision of the presiding official is hereby REVERSED, and this appeal is DISMISSED.

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HAROLD B. TATE
v.
U.S. DEPARTMENT OF THE INTERIOR

Docket No.
DA075209143

OPINION AND ORDER

Appellant was removed from his position of teacher with the Bureau of Indian Affairs, effective January 12, 1980, for slapping a student in the face. His past disciplinary record was considered in effectuating the removal. The Board's presiding official, in an initial decision issued April 23, 1980, addressed all issues presented and concluded that the charge against the appellant was supported by preponderance of the evidence and that appellant had failed to show harmful agency procedural error.

Appellant, in his petition for review, questions many factual determinations made by the presiding official. He challenges the presiding official's determination that agency procedural errors were harmless, asserting mainly that he suffered economic hardship as a result of the agency deviation from procedure. Harmful error as defined at 5 C.F.R. 1201.56(c) (3) is that error by the agency in its procedures which, in absence or cure of error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that, based upon the record as a whole, the error was harmful; i.e., caused substantial harm or prejudice to his/her rights. *See also Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). Appellant has presented no evidence to prove his contention that agency procedural error was harmful, depriving appellant of his right to due process.

In his petition for review, appellant has submitted the results of a polygraph test taken after the date of the hearing of this matter. Appellant asserts this is new and material evidence. However, he does not explain the reason why the polygraph examination could not have been administered and admitted at an earlier date.

Therefore, without addressing the admissibility or weight to be given polygraph examinations in an administrative proceeding, the Board, having fully considered appellant's petition for review of the initial decision issued on April 23, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113 (b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

BENNETTA B. WASHINGTON
v.
U.S. DEPARTMENT OF LABOR

Docket No.
DC031709007

OPINION AND ORDER

Petitioner is a GS-16 Special Assistant to the Assistant Secretary for Employment and Training, U.S. Department of Labor. Her position was determined not eligible for conversion to the Senior Executive Service (SES) pursuant to Title IV of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (October 13, 1978). The exclusion of petitioner's position from SES was based on the agency's determination that her position did not substantially meet any of the five criteria for conversion set forth in 5 U.S.C. 3132(a)(2). The agency further determined that petitioner's position did not meet the ten managerial criteria outlined in Attachment 1 to Bulletin No. 920-1, U.S. Civil Service Commission (October 23, 1978), pointing out that criterion (b)(2)(ix) of that attachment specifically excluded "essentially advisory and non-managerial" positions. The agency contended that petitioner's role was that of an advisor or assistant to the Assistant Secretary in certain specialized areas but was not managerial in nature.

On appeal, the presiding official found that petitioner's position met none of the requirements for inclusion in SES and, accordingly, sustained the agency's action.

Petitioner now seeks review of the initial decision alleging erroneous interpretation by the presiding official of 5 U.S.C. 3131 et seq. and contending: (1) that, in executing the duties of her position, she exercised "executive functions" within the meaning of 5 U.S.C. 3132(a)(2)(E); (2) that, in providing her "expertise" on women's affairs to departmental officials responsible for determining policies, she was acting as a policy-maker under 5 U.S.C. 3132(a)(2)(E); and (3) that she was also qualified under 5 U.S.C. 3132(a)(2)(B) and (C) for inclusion in SES. In opposition to the petition for review, the agency reiterated its original contention that petitioner's position did not qualify for conversion to SES.

In light of the manner of our disposition of this case, we will first address petitioner's third contention and then treat her first and second contentions which will be joined to maintain clarity and to avoid unnecessary repetition.

Under 5 U.S.C. 3132(a)(2), a position properly includible in SES is characterized, in pertinent part, as one in which an employee:

> (A) directs the work of an organizational unit;
>
> (B) is held accountable for the success of one or more specific programs or projects;
>
> (C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;
>
> (D) supervises the work of employees other than personal assistants; or
>
> (E) otherwise exercises important policy-making, policy-determining, or other executive functions;

In determining whether petitioner's position qualified for conversion to SES, the duties to be considered are not, as petitioner urged, the duties she actually performed but, rather, the duties to which she was officially assigned at the time of conversion. *See Hersman v. National Science Foundation,* 2 MSPB 132 (1980). Hence, petitioner's position description is the document specifying her official duties. That document reveals that as Special Assistant to the Assistant Secretary, petitioner was charged with the following responsibilities: serving "as liaison for the Assistant Secretary;" performing "assignments . . . at the initiative of the Assistant Secretary and/or" on her own; providing "guidance to executive managers in the public and private sector;" informing the Assistant Secretary of problem areas; representing and speaking for the Assistant Secretary; working "under the general direction of the Assistant Secretary . . . and his Deputy;" and, based on established objectives and goals, assisting the Assistant Secretary in the execution of his responsibilities.

Petitioner contended that her position was includible in SES under 5 U.S.C. 3132(a)(2)(B). However, petitioner's function, pursuant to her position description, was to "assist" the Assistant Secretary in carrying out his responsibilities, and, in doing so, she advised and informed him as necessary. Although petitioner was permitted to initiate assignments, she did so only within the confines of her position relationship to the Assistant Secretary. It was he, and not petitioner, who was ultimately responsible for the success or failure of any program or project in which petitioner assisted. (Tr. p. 8). Hence petitioner's position did not qualify for conversion to SES under criterion (B).

Pertaining to criterion (C), petitioner's position description specifically stated that petitioner made recommendations, gave advice, furnished information on various programs, provided "interpretations of program trends, reports and progress," and based on the "objectives and goals established for the Manpower program," assisted the Assistant Secretary in carrying out his responsibilities under such a program. (*See* also Tr. pp. 20-21). Nowhere in her position description is it suggested that petitioner was authorized to adjust those goals. Consequently, her position did not substantially meet the requirement for inclusion in SES under criterion (C).

In support of her contention that her position qualified for inclusion in SES under 5 U.S.C. 3132(a) (2) (E), petitioner relied heavily on the legislative history of that section. She quoted from S. Rep. No. 95-969, 95th Cong., 2d Sess. 1, 69, 147, *reprinted in* [1978] U.S. Code Cong. & Adm. News 2723, 2791, 2881, which, she urged, demonstrated that Congress, by adding the clause "otherwise exercises important policy-making, policy-determining, or other executive functions," intended that OPM exercise flexibility in including persons in SES and that employees need not be managers to qualify for inclusion in SES. She therefore challenged criterion (ix) of FPM Bulletin No. 920-1 which required that, for inclusion in SES, "policy-making or executive functions . . . directly relate to organizational and managerial effectiveness," and which expressly excluded " 'assistants to' or technical advisors who have no direct management or supervisory responsibilities."

In quoting from the legislative history of section 3132(a) (2) (E), petitioner omitted a crucial portion of the Congressional language inconsistent with her contention. Stated in its entirety, that paragraph reads as follows:

> The conference substitute in section 3132(a) (2) includes individuals who monitor progress toward organizational goals and periodically evaluate and make appropriate adjustments to such goals, or who exercise important policymaking, policy-determining or other executive functions. Thus, the conferees agreed that the Senior Executive Service should include senior Government managers and other individuals who may not have direct management or supervisory responsibilities but occupy important policymaking, policy-determining or other executive positions in an agency. (S. Rep. No. 95-969, 95th Cong., 2d Sess. 1, 147, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 2881).

The foregoing portion of the legislative history indicates that Congress' foremost concern was focused on the inclusion into SES of "senior . . . managers" and others occupying some other type of managerial position which, although less than "senior," qualified as an "imoprtant policymaking, policy-determining or . . . executive" position. Further supporting this interpretation is the language "not have *direct* management or supervisory responsibilities." It may be reasonably implied that by using this language, Congress intended to require the performance of some degree of managerial function, albeit circuitous. Had Congress merely intended that all high-level positions qualify for inclusion in SES, it could simply have so stated.

Under 5 U.S.C. 3136 and section 413(k) of the Civil Service Reform Act (Reform Act), OPM is authorized by Congress to prescribe regulations to carry out the establishment of SES, and section 413(b)(1) of the Reform Act directs that designations of SES positions be made under the guidance of OPM. Great deference is accorded the administrative interpretation of an act by the agency charged with its implementation, particularly where, as in the instant case, the legislative history supports the agency's construction, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), and where the administrative practice involves contemporaneous construction of a statute by the agency "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1968), quoting from *Power Reactor Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). *See also Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Hence, we find that OPM's interpretation of 5 U.S.C. 3132(a)(2)(E), set forth in criterion (ix) of FPM Bulletin No. 920.1, is entitled to due deference.

As we previously determined, petitioner's position did not qualify as a managerial position includible for conversion to SES under 5 U.S.C. 3132(a)(2)(B) and (C). Further, petitioner's position description fails to reveal that petitioner's position satisfied criteria (A) and (D) under 5 U.S.C. 3132(a)(2), and petitioner did not so contend. Thus, in view of our interpretation of 5 U.S.C. 3132(a)(2)(E) as contemplating some indirect managerial activity in conjunction with "important policymaking, policy-determining, or other executive functions," and in light of our finding that petitioner's position was not managerial in nature, we find that petitioner's position failed to qualify for inclusion in SES under 5 U.S.C. 3132(a)(2)(E). Hence, we consider it unnecessary to determine whether petitioner's position qualifies as "policymaking" or "executive" under that section.

For the foregoing reasons, we find no error in interpretation by the presiding official of 5 U.S.C. 3132(a)(2). Therefore, the petition fails to meet the criteria for review under 5 C.F.R. 1201.115.

Accordingly, the petition for review is hereby DENIED.

This is the final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., ***November 17, 1980***

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JERRY F. BASS
v.
DEPARTMENT OF THE NAVY

Docket No.
PH300A8010038

OPINION AND ORDER

Appellant, after resigning his position as a welder at the Norfolk Naval Shipyard, sought re-employment but has not been rehired. He appealed the agency's failure to rehire him, alleging it is based on his union activities and constitutes violations of various merit principles set forth at 5 U.S.C. 2301 (b).

The appeal was dismissed in an initial decision dated July 25, 1980, for lack of jurisdiction. In a petition for review of that initial decision, appellant maintains that temporary welders have been hired and that he has now amended his application to include temporary employment. He anticipates that an appeal may lie if any temporary employees are converted to permanent employment. Appellant does not dispute that no welders have been hired for permanent employment since he filed his application. Therefore, no action cognizable under 5 U.S.C. 7701 (a) has been taken on which an appeal now lies.

In his petition, appellant requests the Board to "maintain this case in an open status until such time as facts or material evidence can be established to determine jurisdiction in the near future." The Board must determine jurisdiction of this appeal on the basis of the record before it. Should circumstances change or the appellant believe that some subsequent action by the agency constitutes the basis for an appeal to the Board, he may file such an appeal and a decision on jurisdiction will be rendered on the basis of the record in that appeal.

With respect to this proceeding, appellant in his petition for review has not met the criteria for review set forth at 5 C.F.R. 1201.115. The petition for review is therefore DENIED.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BYRON N. GALLAGHER
v.
DEPARTMENT OF AGRICULTURE

Docket No.
SE07528010020

OPINION AND ORDER

Appellant, a preference eligible employee in the excepted service, was terminated by the respondent agency prior to his completion of one year of current continuous service. Appellant's appeal to the Seattle Field Office of the Board was dismissed for lack of jurisdiction, and he now petitions for review of that decision, raising general objections thereto.

A preference eligible employee is entitled to appeal to the Board only upon completion of one year of current continuous service. *See* 5 U.S.C. 7511(a) (1) (B); *Metz v. U.S. Postal Service*, 2 MSPB 103 (1980); and *Villoria v. U.S. Postal Service*, 2 MSPB, 107 (1980). Hence, as the presiding official correctly determined, appellant, because he had been employed for a period of less than one year, had no right of appeal to the Board.

Accordingly, the petition fails to meet the criteria for review set forth in 5 C.F.R. 1201.115 and is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CHARLES A. NURSE
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
DC075209002

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on October 10, 1979, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

Since appellant has failed to make any allegations which are of subject matter appealable to the Board, the presiding official properly found that he lacked jurisdiction to adjudicate appellant's case. Appellant, however, has alleged a prohibited personnel practice in his petition and has attached a copy of a criminal history search by the D.C. Police which discloses "no record." We note that procedures do exist whereby such an allegation may be investigated by the Special Counsel in the absence of an otherwise appealable action. *See* 5 U.S.C. 1206(a)(1), 5 C.F.R. 1251.101, *et seq.*, and 5 U.S.C. 2302(b)(2). Consequently, in this case as in other nonappealable cases involving such allegations, we are herewith referring petitioner's allegations to the Acting Special Counsel for such action as she may find appropriate.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT L. REAMES
v.
U.S. DEPARTMENT OF AGRICULTURE
SOIL CONSERVATION SERVICE

Docket No.
SL531D09004

OPINION AND ORDER

Appellant, Robert L. Reames, appealed to the Board's St. Louis Field Office from two reconsideration decisions by the U.S. Department of Agriculture (agency) affirming its negative determination concerning his acceptable level of competence (ALOC) and the decision to withhold his within-grade increase. The agency had issued a negative determination on August 27, 1979, and a first reconsideration decision on September 27, 1979. Because appellant had not been afforded 60 days advance notice pursuant to OPM regulation at 5 C.F.R. 531.407(c)(5), the agency issued a second reconsideration decision on November 30, 1979.

The presiding official, while affirming the second reconsideration decision on the merits, reversed and remanded the case because the oral presentation made prior to the first reconsideration decision was not transcribed or summarized. He found this to be harmful error under 5 U.S.C. 7701(c)(2)(A) on the basis that the first reconsideration decision states that appellant made no comment about certain items which appellant alleges that he contested in his presentation to the agency deciding official.

In his petition for review, appellant objected to the presiding official's decision to remand the first reconsideration decision to the agency and to affirm the second reconsideration decision. He argued that the evidence did not support the affirmance of the second reconsideration agreement.

The Board, having fully considered appellant's petition for review of the initial decision, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition. Appellant has not presented any new or material evidence and has not demonstrated that the presiding official based his determination on an erroneous interpretation of statute or regulation. In fact, we do not find the procedural error in processing the first reconsideration decision to be harmful. The Board has held that the failure to prepare "a written summary or transcript" of an oral presentation not to be harmful error.[1] Inasmuch as appellant had a full opportunity to present *de novo* all of his reasons for contesting the negative determination at the hearing conducted before the Board's presiding official the procedural error was not harmful. In any event, we do not think that a procedural error in processing the first reconsideration would invalidate the second reconsideration decision, where the second reconsideration complied with 5 C.F.R. 531.407. Therefore, we sustain the agency's second reconsideration decision.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision as modified shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 18, 1980*

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[1] *William E. Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SALVATORE J. GRASSO
v.
INTERNAL REVENUE SERVICE

Docket No.
SL752509002

OPINION AND ORDER

This petition for review is before the Board to appeal the presiding official's dismissal of appellant's case on the ground that it was not within the appellate jurisdiction of the Board.

Salvatore J. Grasso, appellant, received a 5-day suspension, effective February 20, 1979, and a reassignment from a position of Criminal Investigator, GS-7, to Internal Revenue Agent, GS-7, effective March 11, 1979, for off-duty conduct consisting of alleged improper use of his credentials and display of a weapon. The reassignment, although found to be unwarranted by a grievance examiner, was upheld by the agency.[1]

Mr. Grasso filed an appeal of the agency's action with the St. Louis Field Office on September 4, 1979. The petition alleged that the agency action reduced his retirement credit by one percent per year, deprived him of an optional 20-year retirement right, and prevented his promotion to the GS-9 level.[2] The alleged loss in retirement benefits resulted from appellant's reassignment from a law enforcement position to a non-law enforcement position.[3]

The presiding official dismissed the appeal on the ground that it was not within the Board's appellate jurisdiction citing (1) 5 U.S.C. 7501-7504 which do not provide an appeal right to the Board for suspensions of 14 days or less, and (2) 5 C.F.R. 1201.3(a) (1979) which does not include a reassignment in the actions appealable to the Board. The presiding official also found that appellant's assertions regarding the loss of retirement benefits did not constitute an appealable matter under 5 U.S.C. 7512.

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[1] The grievance examiner found that the reasons given for the reassignment were not supported by the facts surrounding the off-duty conduct, that appellant's job performance was not affected by the off-duty conduct, and that the reassignment might have an adverse impact on appellant's career in law enforcement.

[2] The record shows that appellant was promoted to a GS-9 Internal Revenue Agent, effective September 9, 1979.

[3] 5 U.S.C. Chapter 83, Subchapter III, provides special retirement benefits for law enforcement officers. See discussion at pp. 4-5 *infra*.

The petition for review alleges erroneous interpretation of statute and regulation by the presiding official in dismissing the case on the basis of the Board's lack of appellate jurisdiction. In support of this claim, the appellant asserts the following: (1) that 5 C.F.R. 1201.3 does not by words of limitation exclude from the Board's appellate jurisdiction adverse actions other than those specifically included, (2) that he will suffer severe financial damage due to the one percent per year reduction in credit to his retirement fund and the loss of the optional 20-year retirement right, and (3) that this financial damage is more severe than a suspension of more than 14 days which is specifically included as an appealable action under 5 C.F.R. 1201.3(3).

Two disciplinary actions were taken against appellant, a 5-day suspension and a reassignment. Our reading of the petition for review is that appellant is appealing the reassignment, because it is this personnel action which resulted in the alleged loss of retirement benefits cited by him in the petition for review.

The petition for review presents the following issue to the Board: whether the reassignment is within the appellate jurisdiction of the Board under 5 U.S.C. 7512 as an adverse action, or under 5 U.S.C. 8347(d) because of the alleged loss of retirement benefits.

The presiding official, without discussion, noted that appellant was reassigned without loss in pay or grade. A reassignment is not appealable to the Board under 5 U.S.C. 7512 unless it results in a reduction in pay or grade.

A reduction in grade is appealable to the Board under 5 U.S.C. 7512(3). The facts on the record show that appellant was reassigned from a GS-7 Criminal Investigator to a GS-7 Internal Revenue Agent. Since the grade level of both positions was the same, clearly there was no reduction in grade. See *Lange v. Department of Transportation*, 2 MSPB 110 (1980).

A reduction in pay is an adverse action appealable to the Board under 5 U.S.C. 7512(4). The word *pay* is defined at 5 U.S.C. 7511(4) for the purposes of an adverse action as "the rate of basic pay fixed by law or administrative action for the position held by an employee."

Since both of the positions involved are under the General Schedule, the applicable rate of "basic pay" is established by 5 U.S.C. 5332. The record shows that appellant was reassigned to the new position at the same grade and step as his former position. Thus, the rate of basic pay that appellant received as a GS-7 Internal Revenue Agent, was the same rate of basic pay that he received in his former position of Criminal Investigator, GS-7.

Therefore, we conclude that since appellant was reassigned from one GS-7 position to another GS-7 position with no loss in the rate of basic pay, he has not suffered a reduction in pay. Since no reduction in grade or pay resulted from the reassignment action, appellant has no appeal rights to the Board under 5 U.S.C. 7512.

Next we consider whether appellant has appeal rights to the Board under 5 U.S.C. 8347(d) based on his claim of the loss of certain retirement benefits. The alleged loss in benefits resulted from his reassignment from a law enforcement to a non-law enforcement position. Under section 8347(d) the Board has appellate jurisdiction over certain retirement-related matters as follows: "An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board."

Appellant is asserting the loss of present and future retirement benefits conferred by 5 U.S.C. 8336(c) and 8339(d). Section 8336(c) provides optional retirement for law enforcement officers after 20 years of service and section 8339(d) prescribes the method for computing the annuity of one who retires under section 8336(c). Further, 5 U.S.C. 8331 increases the salary base upon which an annuity is determined because of its special definition of *basic pay* for law enforcement officers.[4]

Because appellant was a law enforcement officer prior to the reassignment, he was able to accrue service creditable towards meeting the requirements of section 8336(c), and he was also subject to higher deductions than regular employees under section 8334(a)(1), such deductions going toward the credit of his retirement benefits.

The Board discussed its jurisdiction under 5 U.S.C. 8347(d) in *Hein v. Office of Personnel Management*, 1 MSPB 396 (1980), where it was held that the Board's regulations found at 5 C.F.R. 1201.1 (1979), *et. seq.* governing the processing of appeals, also include processing of any appeals under 5 U.S.C. 8347(d).

Whether the Board has jurisdiction in appellant's case depends on the scope of the Board's review under section 8347(d).

The Board's interpretation of the scope of its review under 5 U.S.C. 8347(d) is provided at 5 C.F.R. 1201.3(a)(6), which states that the Board's appellate jurisdiction includes "[d]eterminations relating to disability retirement . . . . and annuities."

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[4] We find that this definition of *basic pay* is limited to retirement matters covered by Chapter 83, Subchapter III (Civil Service Retirement), Title 5 of the U.S. Code. It does not affect the definition of *pay* or *rate of basic pay* for purposes of an adverse action or our finding that appellant's reassignment did not result in a reduction in pay. See discussion at pp. 3-4 *supra.*

Clearly, appellant's case is not based on a determination relating to disability retirement.

Appellant's case also does not involve a determination relating to an annuity. Entitlement to an annuity is based on age, length of service, and other requirements of Title 5, Chapter 83 (Civil Service Retirement), Subchapter III of the U.S. Code.

A question concerning an annuity would not arise until such time as an employee was eligible to file a claim for an annuity, usually upon retirement. See 5 U.S.C. 8331(9), 8339, and 8345(b).

Based on the facts in the record, appellant is currently employed in the service. He does not meet the age, service or other requirements for filing a claim for an annuity. Although the alleged loss of retirement benefits concerns benefits which are granted under the subchapter on retirement, they are not the result of, nor do they constitute a determination relating to an annuity. Therefore, appellant's assertions regarding the loss of retirement benefits do not fall within the scope of the Board's review of retirement matters as defined by 5 C.F.R. 1201.3(a)(6). Therefore, we find that the Board does not have appellate jurisdiction in this case under 5 U.S.C. 8347(d).

Since we find no basis for the Board's jurisdiction under 5 U.S.C. 7512 or 8347(d), we find no error by the presiding official in dismissing this case on the ground of lack of appellate jurisdiction by the Board.

Under 5 C.F.R. 1201.115 (1979), the Board may grant a petition for review when it is established that the decision of the presiding official is based on an erroneous interpretation of statute or regulations. Since there was no error by the presiding official, we find that appellant's petition does not meet this criteria.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby notified of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision by the appellant.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT C. HUG v. DEPARTMENT OF THE ARMY	Docket No. DC531D09017

OPINION AND ORDER

In an initial decision dated March 11, 1980, the presiding official reversed a determination of the Department of the Army to deny appellant a within-grade increase. This decision was based on a finding that the agency committed harmful error in the application of its own procedures. While we agree that the agency failed to comply with its own procedures, we must REVERSE the decision below on the grounds that appellant has failed to show that the error was harmful.

The Army's internal regulations establish procedures for reaching a negative determination on employee's within-grade increase. They are somewhat more stringent procedurally than those of general application. 5 C.F.R. Part 531, Subpart D. In addition to requiring that an employee be given 60 days advance notice that he is not performing at an acceptable level of competence prior to the final decision to deny the increase, section 13c(4)(b)[1] of MDW 690-430 (Military District of Washington) (Agency Exhibit 2A) states that the final notice will contain a concurrence by the "next higher supervisor." Appellant received his advance notice on May 21, 1979, signed by Col. Raymond Crum, his second line supervisor. On September 5, 1979, the agency issued appellant the final notice that he would not receive his within-grade increase. This letter was signed by Col. David Loyd, Col. Crum's successor.

In its petition for review, the Army first argues that the presiding official misinterpreted Army regulations in finding that the letter of September 5, 1978, must be signed by a higher ranking official than the letter of advance notice. The agency further argues that even if concurrence by a higher official were required, the failure to obtain such concurrence would not be harmful error in the current case.

The agency argues that the cited section of the Military District of Washington's local procedures was based on Department of the

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[1] The agency incorrectly refers to this action as section 14c(4)(b) in its petition for review.

Army Regulation CPR 990-2, Book 531, S4-9, which, it asserts, has been superseded by CPR-2 990-2, Book 531, S4-9c dated October 5, 1977. (Agency Petition for Review, Enclosure 1). Thus, it argues that the controlling regulation at the time the instant case arose, unlike the earlier agency wide regulation, did not specifically require concurrence by a higher level supervisor. Therefore, the Army concludes that inasmuch as MDW Reg. 690-430 "was based upon an agency-wide regulation and in that the agency-wide regulation was subsequently changed to remove the concurrence requirement, . . . the intent of the MDW Regulation was to comply with agency policy, not, . . . to guarantee the Appellant a right to such a concurrence." Agency Petition for Review at 3. We have reviewed the cited subsequent regulation. It is entitled "Hours of Duty, Pay and Leave Annotated," and identifies specific deletions or changes to existing agency-wide regulations in effect at the time. We find no basis nor any evidence that S4-9c purported to modify the concurrence requirement of section 13c(4)(b) as based on Book 531, S4-9. Absent some specific evidence that supersession or modification was intended, we will not so conclude. See 1A Sands *Sutherland Statutory Construction*, sections 22.30, 23.10 (4th ed. 1972). Accordingly, we believe the presiding official correctly found the agency in error in not conforming to the procedures of section 13c(4)(b).[2]

Having found the agency committed error we must determine whether it was harmful error within the meaning of 5 U.S.C. 7701(c)(2) and 5 C.F.R. 1201.56(c)(3). The presiding official correctly cited the case of *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), as establishing the Board's standards for a finding that harmful error has occurred. *Parker* makes it necessary to "assess the likely effect of the alleged error in actual probability in light of all the evidence." Initial Decision at 3, *quoting from Parker*. However, the Board also stated in *Parker* that "the mere theoretical possibility of prejudice cannot suffice as a basis for inferring actual prejudice." *Id.*, 493.[3]

In his brief before the field office, appellant has simply argued that "there can be no doubt that appellant was deprived of the valuable opportunity of having an impartial review by a higher level of management before issuance of a final decision." (Appellant's brief at 1.) Similarly, the presiding official concluded that "it is within reason to expect that an impartial review by a higher level in the organization may have resulted in a different determination than the one made by Col. Loyd on September 5, 1979." Initial Decision at 3.

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[2] This argument concerning modification or supersession of section 13c(4)(b) was made for the first time in the petition for review. In the absence of some evidence why it was not, or could not, have been raised at the hearing, it does not constitute new and material evidence within the meaning of 5 C.F.R. 1201.115(a).

[3] In *Parker* the Board discussed the legislative history of the Reform Act and found that one of the Act's major purposes was to avoid reversals because of technical procedural errors. See *Parker*, 492, n.4.

In opposition, the agency has submitted argument in its petition for review which convinces us that had the error not occurred, it would not "have caused the agency to reach a conclusion different than one reached." 5 C.F.R. 1201.56(c)(3). The three factors stated in *Parker* for determining whether it is likely that the error had a harmful effect upon the outcome before the agency are "the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error." *Parker,* 493. In support of the argument that the decision was not a close one, the agency has demonstrated that five of appellant's supervisors testified concerning appellant's job performance. While we express no view on the merits of appellant's case, the unanimity of opinion among appellant's supervisors concerning his performance persuades us that it is unlikely the decision would have been different had another supervisor concurred in that decision. Furthermore, the letter of May 21, 1979, was signed by appellant's second line supervisor, Col. Raymond Crum, rather than his immediate supervisor, Col. Charles Madden. Nonetheless, the record clearly shows that Col. Madden concurred in this judgment and would have acted similarly had he prepared and signed the notice. (Hearing transcript, HT, pp. 13-98). Thus, when the September 5, 1979, letter was signed by his second level supervisor, there was a concurrence by an official a level higher than was required for the advance notice. Moreover, the September 5, 1979, letter denying appellant's within-grade increase was signed by Col. Loyd, who had succeeded Col. Crum as appellant's second line supervisor. Col. Loyd made his decision based on appellant's performance during the waiting period, and consultation with Major Charles Clark, appellant's Team Chief. Although the final decision was made at the same level of review, appellant was given the benefit of yet another opinion on the matter.

The purpose of requiring that a higher level official concur in the decision to deny a within-grade increase is to ensure that an employee is dealt with fairly and that an increase is denied on objective, work related grounds. To fail to obtain concurrence constitutes procedural error. However, the purpose of section 13c(4)(b) was served in this case in that at least four of appellant's supervisors were involved in the decision to deny his within-grade increase. Given this factual setting, we conclude that the error was not of such magnitude as to suggest the result would have been different had it not occurred.

Accordingly, the petition for review is GRANTED, the initial decision is REVERSED, and the matter is REMANDED to the Washington Field Office for decision on the merits.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARY M. JOHNSON
v.
DEPARTMENT OF AGRICULTURE

Docket No.
CH035109008

OPINION AND ORDER

Appellant's request, filed February 25, 1980, that the Merit Systems Protection Board (the Board) review the presiding official's initial decision, CH035109008, of February 19, 1980, is DENIED.

The agency used reduction-in-force procedures in order to change appellant from the position of Personnel Assistant, GS-7, to Personnel Assistant, GS-6, effective September 23, 1979. He filed his appeal on October 3, 1979, claiming that the agency had improperly used reduction-in-force procedures to downgrade him and that he had been subject to prohibited discrimination.

The presiding official, in his initial decision of December 28, 1979 (CH035109003), found that the agency had improperly used reduction-in-force procedures in order to change appellant's position to a lower grade and that the appellant had not demonstrated that he had been subjected to prohibited discrimination. The presiding official then erroneously reversed the agency's action "because the agency improperly used reduction-in-force procedures."

We then issued an Order dated January 21, 1980, whereby the case was reopened, reversed and remanded for reconsideration in light of 5 U.S.C. section 5366.

Upon reconsideration the presiding official found that the appealed action concerned a reclassification of the appellant's position with retained grade and pay rather than a reduction-in-force action. He then dismissed the appeal, holding that a reclassification of position with retained grade and pay is not appealable to the Board and that thus, the action did not come within the Board's appellate jurisdiction. Additionally, as the appeal was outside the scope of the Board's appellate jurisdiction, he was unable to consider appellant's allegation of prohibited discrimination.

Appellant's petition for review, in pertinent part, contests the presiding official's jurisdictional determination. However, we find that the action concerned the correction of a classification error, a reclassification of appellant's position with retained grade and pay, rather than a reduction-in-force. We hold that the presiding official correctly determined that, as such, the personnel action was not appealable to the Board. 5 U.S.C. section 5366(b); 5 C.F.R. section 536.201 *et seq.* Thus the personnel action is not appealable to the Board under any law, rule, or regulation, and as such, the action is outside the scope of the Board's appellate jurisdiction. 5 U.S.C. section 7701(a).

The presiding official's finding that he could not consider the allegation of prohibited discrimination was correct, as the allegation was not made in conjunction with an appeal of a personnel action which was otherwise appealable to the Board. *See* 5 U.S.C. section 7702 *and* 5 C.F.R. section 1201.151.

In short, we find that the initial decision of February 19, 1980, is a correct statement of the pertinent law.

Accordingly, the petition is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby notified of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this Opinion and Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSEPH H. KANNER
v.
DEPARTMENT OF THE ARMY

Docket No.
PH035109027

OPINION AND ORDER

The appellant's position was abolished and he was downgraded in a reduction in force from Education Program Administrator, GS-16, to Education Specialist, GS-15. He appealed to the Philadelphia Field Office and requested a hearing. When he received his copy of the agency submission in response to the appeal, the appellant withdrew the hearing request. The case was adjudicated on the basis of the record, and the presiding official affirmed the agency action.

The appellant submitted a petition for review on the following bases: (1) the evidentiary standard applied by the presiding official was incorrect; (2) the presiding official considered material which had been stricken from the record; and (3) the record does not support the initial decision. The petition is hereby GRANTED.

The presiding official correctly noted that the agency had the burden of supporting its case by a preponderance of the evidence. He found that action was taken against the appellant for a legitimate reduction-in-force reason, i.e., reorganization. Initial Decision at 2. The presiding official then described the types of affirmative defenses available to the appellant and announced that the burden of proving them rested with the appellant. The appellant's allegation that the GS-15 position offered him in the reduction in force was identical to the GS-16 position allegedly abolished was treated as an affirmative defense.

In *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), the Board held that the burden of persuasion as to the propriety of invoking reduction in force never shifts from the agency. In this case, it appears that the presiding official was satisfied that the agency had made out a prima facie case on this element. The appellant's allegation, however, should have been viewed by the presiding official as a challenge to the agency's asserted reason for the reduction in force instead of an affirmative defense which the appellant was required to prove. *Losure, id.*,

366. If the abolished position and the one offered the appellant were identical, then there was no reorganization as affected the appellant and it was improper to invoke reduction-in-force procedures in his case. The Board finds that the burden of proof in this regard was incorrectly placed on the appellant.

The appellant next alleged that the presiding official improperly considered material which had been stricken from the record as a sanction imposed on the agency for ex parte communication with the presiding official. The circumstances surrounding the sanction are as follows. After the appellant withdrew his request for a hearing, the presiding official wrote a letter to the parties advising them of the final date for receipt of written submissions. In that letter, he asked the agency to produce specific evidence. A representative of the agency telephoned the presiding official to request an extension of the time allowed to submit the material. The conversation was documented in a letter from the agency to all parties noting the three day extension of time allowed by the presiding official. When the Acting Chief Appeals Officer learned of the contact, he reassigned the case to another presiding official. After allowing for responses from the parties, the new presiding official imposed a sanction on the agency by striking its submission from the record.

A motion for an extension of time is required to be in writing, and, therefore, if it is made orally without opportunity for other parties to participate, it can be considered an ex parte communication under the Board's regulations. 5 C.F.R. 1201.55; 5 C.F.R. 1201.101. The regulations make it clear, however, that not all ex parte communications are prohibited. In determining whether a communication is prohibited, a balance must be struck between insuring a fair and impartial adjudication of the case and allowing for flexibility in case processing.

The agency argued that it could not have submitted a written request in time for the presiding official to act on it prior to the scheduled date for the closing of the record. Under these circumstances, the Board finds that the agency acted reasonably when it telephoned the presiding official and followed up with the written request. There has been no showing of harm to the appellant or partiality on the part of the presiding official. The Board concludes that the telephone call was not a prohibited ex parte communication and that the sanction imposed by the presiding official was unwarranted.

The agency submission does not appear anywhere in the record, and the Board is not persuaded that, after striking it from the record, the presiding official nonetheless considered it. The appellant's response to the agency submission remained in the record and was relied on by the presiding official. In all likelihood, the presiding official's references to this material caused the appellant to believe that the stricken material had been considered.

It is unnecessary to reach the appellant's final basis for the petition, i.e., that the decision is unsupported by the evidence of record. In view of our findings, above, the initial decision is hereby VACATED and the case is REMANDED to the Philadelphia Field Office for readjudication consistent with this opinion. The field office is instructed to obtain the evidence which was improperly stricken from the record and schedule the hearing which the appellant now requests in order to fully develop the record.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARMEN D. MARTINEZ v. DEPARTMENT OF THE ARMY	Docket No. DC075209219

OPINION AND ORDER

Appellant, a non-probationary and non-preference eligible employee, filed an untimely petition for appeal from the agency's action removing her from her position in the Canal Zone Merit System (CZMS). The CZMS was established at 35 C.F.R. Part 251 for governing federal employment in the Canal Zone and is maintained under authority vested in the President by the Panama Canal Act of 1979, Pub. L. No. 96-70, 93 Stat. 461 *et seq.* (1979) (the Canal Act), effective October 1, 1979.[1] After affording appellant the opportunity to establish the jurisdiction of the Board to hear her adverse action appeal pursuant to 5 C.F.R. 1201.56(a)(2), the presiding official issued an initial decision in which he found that appellant was not an "employee," 5 U.S.C. 7511(a)(1), with the right to appeal an adverse action to this Board. The presiding official determined that as a CZMS employee, appellant by regulation was not afforded the right to appeal an adverse action to the Board. 35 C.F.R. 253.262. The appeal was dismissed for want of purview in the Board.

Appellant timely filed a petition for review asserting that she was entitled to appeal the removal action to the Board. The Canal Act, 22 U.S.C. 3654, however, continued in effect the CZMS and the regulations promulgated thereunder by the President until the Panama Canal Employment System is established by the President pursuant to 22 U.S.C. 3652. Under still effective regulation 35 C.F.R. 253.241, reduction-in-force procedural protections applicable to the competitive service are extended to CZMS employees, but adverse action procedures are applicable only to preference eligibles in the CZMS. Pursuant to 35 C.F.R. 253.262, non-preference eligible CZMS employees are afforded the adverse action procedural protections of 5 C.F.R. Part 752, but they are not extended the right to appeal an adverse action to the Board. The presiding official, therefore, did not err in dismissing the petition for appeal of the adverse action, as appellant is not an

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[1] Codified at 22 U.S.C. 3601 *et seq.*

"employee" for purposes of 5 U.S.C. 7511(a)(1) and as she has not been afforded a right to appeal an adverse action to the Board under current regulations governing CZMS employees. Until the President establishes the Panama Canal Employment System and unless he determines under section 3652(d)(2) of the Canal Act to extend to the employees therein the rights and privileges provided employees in the competitive service, such non-preference eligible employees may not appeal an adverse action to the Board under 5 U.S.C. 7701.

Accordingly, the petition for review of the initial decision is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CRAWFORD E. MOSELY
v.
DEPARTMENT OF THE NAVY

Docket No.
AT075299044

OPINION AND ORDER

The appellant is an employee of the Marine Corps Logistics Base, Albany, Georgia. On April 3, 1979, he was placed on sick leave, without his consent, as the result of a fitness-for-duty examination. The agency had had the appellant's personal physician examine him. The resulting statement from the doctor indicated that performing the full range of the duties of a warehouseman was "probably a little bit too much for him to do at this particular time." The appellant was informed that agency management was attempting to find another position for him that would not aggravate his back condition. He was further informed that he could return to work if he could provide a medical release or if his condition did not permit his return to duty as a warehouseman, he might also consider requesting a change to lower grade or filing for disability retirement.

The appellant submitted a second doctor's statement which the agency did not consider to release him for full duty. Accordingly, he continued in a leave status. The appellant submitted an appeal of this enforced leave status to the Board's Atlanta Field Office.

On appeal, the appellant contended that he is ready, willing and able to work and that the agency's action keeping him on leave against his will amounts to an adverse action (a suspension of more than 14 days). To fully develop the evidence on the questions of the appellant's fitness to return to work and the agency's motive in placing him on leave, the field office held a hearing on July 10, 1979. The presiding official found that the action taken by the agency did not constitute a suspension within the meaning of 5 U.S.C. 7501(2), and accordingly, dismissed the appeal as not within the Board's appellate jurisdiction.

In his petition for review, the appellant asserts that the presiding official did not "take all the issues of this complaint under consideration when he issued the decision." Although the petition points out areas in which the appellant disagrees with the findings made by the presiding official, the only "issues" which he identifies that the presiding official allegedly did not consider is that:

> On Page 32 of the transcript, the witness (the appellant) testified that he has been seen by the V.A. Hospital in Atlanta, Georgia, in connection with his service connected disability. He testified that his condition has not worsened during the time he has been seen by the V.A. Hospital.

The agency response to the petition for review states that the presiding official considered all of the material issues in the case. It further contends that the petition for review has not presented evidence or argument which would meet either of the criteria of 5 C.F.R. 1201.115 for granting a petition for review.

The Board finds that the presiding official did properly identify the questions which must be answered in order to determine if the matter at issue was one within the Board's appellate jurisdiction. *Armand v. U.S.* 136 Ct.Cl. 339 (1956); *Washington v. Cameron*, 411 F.2d 705 (D.C. Cir. 1969); and 38 C.G. 203 (1958). Those matters were:

1. Was the appellant placed on sick leave without his consent?

2. Was the appellant, in fact, ready, willing, and able to work during the period of leave?

3. Was the enforced leave used in a personal, disciplinary-type of situation?

The initial decision reflects that the presiding official made findings on all of the above questions. The "issue" that appellant now seeks to raise is not, in the Board's view, an independent issue which must be resolved in this case. Rather, appellant's testimony that his condition has not worsened is a factor which could have a bearing on the determination of whether or not he was ready, willing and able to work during the period of leave. The appellant's testimony in this regard was before the presiding official. The initial decision reflects that evidence upon which the presiding official relied in making his findings that the appellant was neither willing nor able to work during the period of enforced leave. The Board finds no error in the presiding official's failure to mention specifically the effect of the appellant's testimony that his condition had not worsened since he had been seen at the Veterans Administration Hospital.

The Board, having fully considered appellant's petition for review of the initial decision issued on April 23, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM E. NORWOOD AND HARRIS D. LONG	Docket No. AT075209095
v. TENNESSEE VALLEY AUTHORITY	Docket No. AT075209096

OPINION AND ORDER

On October 20, 1979, appellants were changed from the grade of SE-7, Civil Engineering Associate, to SE-6, Civil Engineering Associate, by the Tennessee Valley Authority, Spring City, Tennessee. The appellants filed separate appeals with the Atlanta Field Office from the change to lower grade actions, and their cases were consolidated for processing because they involved identical issues, namely, appellants' claim that the action should have been done by reduction in force and not by adverse action procedures and that the stated reasons for the downgrading action were not the real reasons. After hearing, the presiding official affirmed the action of the agency in the initial decision dated January 31, 1980.

On February 27, 1980, appellant's representative requested an extension of time for filing a petition for review. By letter, the Board granted appellants until March 19, 1980, to submit a petition for review. No further communication has been received from appellants.

The letter from appellants' representative does not assert that he wishes to submit new evidence, nor contends that the presiding official erroneously interpreted any statute or regulation. Therefore, none of the criteria for review by the Board has been met.

Accordingly, the petition is DISMISSED for lack of prosecution.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellants are hereby notified of their right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL WHEELER
v.
DEPARTMENT OF THE NAVY

Docket No.
PH075209049

OPINION AND ORDER

Appellee, a competitive service employee not serving a probationary period, was removed from employment at the Philadelphia Naval Shipyard effective August 14, 1979, for being absent without authorized leave (AWOL).

The Board's presiding official, following a hearing on November 13, 1979, determined that the agency action should be reversed due to the agency's failure to establish that the appellee was properly notified of his proposed removal. The appellee contended that he did not in fact receive such notice and thus had no opportunity to respond to the agency's charges. At hearing, the record clearly established that the agency had misaddressed its notice of proposed removal to appellee by using the wrong zip code, and, further, the agency was not able to produce a copy of the return receipt reflecting delivery.

The agency petition for review is based upon allegedly newly discovered evidence consisting of:

1. A copy of the return receipt for the notice of proposed removal;
2. A copy of the Post Office form documenting delivery of the notice of proposed removal, and;
3. Affidavits from appellee's shop superintendent and employee relations specialist explaining how the return receipt came into their possession prior to hearing and how appellee, during counseling with his employee relations specialist and another agency employee, admitted to having received the notice of proposed removal shortly after it was sent.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that "new and material evidence is available that despite due diligence was not available when the record was closed . . ." 5 C.F.R. 1201.115(a). We are not persuaded that the documentation proffered by the agency at this late date would not have been available at the time of hearing with the exercise of due diligence. Even though appellee's employee relations specialist was on sick leave for an extended period of time during which time the hearing took place, the key events known to her, as set forth in her affidavit, were known to other agency employees, one of whom testified. The postal form, we assume, was as available prior to hearing as after. There is no merit to the agency's contention that it was surprised to learn at hearing that it would be required to establish proper notice. Even though the burden is appellee's to establish harmful procedural error, 5 C.F.R. 1201.56 (b) (1), the agency must at all times be prepared to respond by a showing of compliance with the procedural requirements of an adverse action such as set forth at 5 U.S.C. 7513(b) (1). Further, the agency's contention in this regard is intenable in light of the appellee's statement in answer to question 8 on the form which initiated his appeal to the field office. The question asked "what was the date (month, date, year) you received the written proposed notice to take this action?" Appellee's answer was "August 8, 1979," which was the same date he indicated as the date of receipt of the agency's final decision notice.

The agency further points to several alleged "erroneous findings of fact" by the Board's presiding official, while recognizing that such allegations do not support a petition for review and "are not crucial to the outcome" of the initial decision. As such, it is not necessary that these allegations be addressed or considered by this Board.

The Board, having fully considered the agency's petition for review of the initial decision issued on December 28, 1979, and the finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days (5) from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

TOM B. WOOLERY
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
AT030009002

OPINION AND ORDER

Tom B. Woolery (the appellant) petitioned the Atlanta Field Office of the Merit Systems Protection Board for appeal of his non-selection for the position of Automotive Equipment Inspector, WG-11, with the General Services Administration (GSA). The appellant alleged that, although he intended to apply for the position, he submitted no application because employees of the Office of Personnel Management (OPM), whom he contacted about the position, informed him that he did not have the necessary civil service status and that the position was restricted to GSA employees. He alleged, further, that he later learned that he did have civil service status at the time of his inquiry and that the position in question had been filled by a recently retired veteran, like himself, who was not a GSA employee when he applied for the position. The copy of the vacancy announcement for the position in question, attached to the original petition for appeal, bore no indication that consideration would be restricted to GSA employees.

The presiding official dismissed the appeal for lack of jurisdiction, concluding that a selection for a particular vacancy does not constitute an appealable "employment practice" under 5 C.F.R. 300.101 and 300.104. The appellant petitioned for review of this dismissal, and OPM opposed the petition.

OPM has asserted in its response to the petition that administrative errors in its dissemination of information concerning civil service employment do not represent appealable "employment practices" under 5 C.F.R. part 300. We agree that such errors are not appealable "employment practices" as that term is circumscribed at 5 C.F.R. 300.101.

OPM has contended further in its response that restriction of the scope of competition for a vacant position does not constitute an appealable "employment practice" because it is a management tool rather than a measurement device, and that, if GSA did impose such a restriction in this instance, it is not an appealable "employment practice" in any event because it was not "applied" to the appellant by OPM, as it must be for the Board's appellate jurisdiction to attach under 5 C.F.R. 300.104(a). While intimating no opinion on the former contention, we find that the Board lacks jurisdiction in this appeal because OPM "applied" no restrictions on the position in question. *Id.* If any restriction was applied to that position, GSA was the imposing authority.

OPM's regulations relating to selection for appointment or promotion, 5 C.F.R. parts 300, 302, 332, and 335, make no mention of restricting the scope of competition for a position. OPM's *Federal Personnel Manual* (FPM) does discuss such restriction to an agency's employees in the context of merit promotion plans. However, while mandating that "[a]gencies must develop, publish, and administer merit promotion plans which apply the policies and requirements of their promotion guidelines to positions to be filled through promotion," FPM ch. 335, subch. 3-1(a) (October 25, 1973), the FPM only offers guidance for administering those merit promotion plans developed by the agencies.

The FPM does not require agencies to limit competition for a position to agency employees under any particular circumstances. That discretion is to be exercised by the agency, as indicated by the following provision:

> The decision whether to restrict consideration to agency employees or to consider concurrently persons from outside the agency should be based on the nature of the job to be filled and on the number of highly qualified candidates available within the agency.
>
> . . . It is entirely proper that positions be filled within the organization as a general rule.
>
> . . . An agency, however, has to guard against the dangers of inbreeding in positions above the entrance level where fresh viewpoints and new ideas are necessary.
>
> . . . Concurrent consideration also may be used in filling positions for which not enough highly qualified candidates can be located within the agency. . . .

FPM ch. 335, subch. 3-3(e) (October 25, 1973). Thus, although OPM generally supports an agency's use of such restriction on the scope of competition for a position in administering a merit promotion plan, OPM cannot be considered to "apply" such restrictions to a candidate for a position in another agency, like th appellant, as must be the case for the Board to have appellat jurisdiction under 5 C.F.R. 300.104(a).

Accordingly, the petition for review of the initial decision date December 6, 1979, is hereby GRANTED and that decision AFFIRMED as MODIFIED in the foregoing opinion.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this opinion and order.[1]

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 19, 1980*

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[1] In his response to the brief of OPM, appellant alleges that the actions of GSA in this case constitute "prohibitive personnel practices . . . [sic]." Under the Civil Service Reform Act of 1978, an allegation of prohibited personnel practice may be raised as an affirmative defense to any agency action appealable to the Board. 5 U.S.C. § 7707(c)(2)(B). However, since we find no appealable action in the instant case, we cannot here consider the allegation of prohibited personnel practice. We do note that the Special Counsel of the Merit Systems Protection Board may receive and determine whether to investigate such allegations under 5 U.S.C. § 1205(a)(1). Our decision in this case in no way precludes appellant from making such allegations to the Office of Special Counsel, nor does it preclude that Office from considering them.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MANUEL T. BORBON

Docket No.
RB083190026

ORDER

The petition of January 25, 1979, as supplemented, requesting that the Civil Service Commission (now Merit Systems Protection Board) reopen and reconsider this case is DENIED.

In reviewing requests to reopen decisions of the former Appeals Review Board of the Civil Service Commission, the Board is required to apply the review standards previously established under 5 C.F.R. 772.312. The information submitted does not establish that any of the regulatory criteria set forth have been met.

The "Analysis and Findings" section of the decision of the Appeals Review Board contains a discussion of the issue pertinent to the adjudication of this case. The record shows that appellant served in the United States Armed Forces in the Far East (USAFFE) from September 1941 to May 1946. As correctly noted in the ARB decision, USAFFE service is not creditable for civil service retirement purposes. Such service is specifically excluded from retirement benefits by P.L. 79-301, which states, in pertinent part, that this military service "shall not be deemed to be or to have been service . . . for the purpose of any law. . . ." Thus, the conclusion by the Appeals Review Board that P.L. 79-301 excludes USAFFE service from the operation of the Civil Service Retirement Law was correct.

Appellant contended in his request to the Board that he is entitled to the benefits of the Missing Persons Act. Under the Act of March 7, 1942, an employee in missing status was entitled to receive or have credited to his account for the period he is in that status, the same pay and allowances to which he was entitled at the beginning of that period. "Missing status" means the status of an employee who is in active service and is officially carried or determined to be absent in a status of missing, interned, captured, etc. Appellant has not shown, nor does the record indicate, that he was missing from his duties as a federal employee at any time during the war. Thus, appellant is not entitled to retirement credit during the occupation of the Philippines for his military service.

The appellant's submissions in his petition are not new or material, nor do they tend to show error in the decision of the Appeals Review Board.

The request to reopen this case is, therefore, DENIED.

This is the final order of the Merit Systems Protection Board in this appeal, and exhausts the appellant's administrative appeal rights in this case. Any further remedy available lies within the federal court system.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROSE MARY MITCHELL
v.
U.S. DEPARTMENT OF AGRICULTURE

Docket No.
SL075209065

OPINION AND ORDER

The Board has fully considered the petition for review of the United States Department of Agriculture (the agency) which claimed the initial decision of July 17, 1980, involved an erroneous interpretation of statutes and regulations.

The agency claims that the presiding official altered the charge underlying the action taken against the appellant. The Board has considered this assertion and has examined the agency's notice of proposed removal which became the basis for the 30-day suspension in question. The Board finds that the presiding official correctly interpreted the charge in question and properly applied Fm HA Instruction 2045-BB, paragraph 2045.1355(a), which states that "Employees must obey lawful orders of Supervisors."

This instruction formed the underlying basis of Reason II of the agency's proposed 30-day suspension. Given this basis and the agency's division of its proposed adverse action into two sections, unacceptable performance and failure to follow instructions, the presiding official reasonably determined that Reason II of the proposal was meant to be more than a second unacceptable performance charge, and therefore the agency was required to prove intentional disobedience or refusal to follow instructions of her supervisor. Thus the presiding official altered neither the charge nor the elements required to be proved by the agency.

Accordingly, the petition for review is GRANTED, and the initial decision of July 17, 1980, is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MELVIN E. PEREZ
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA035309010

ORDER

The Board has considered the appellant's petition for review of the initial decision issued on April 21, 1980, and finds that it sufficiently alleges erroneous interpretations of law and regulations to warrant review. Accordingly, the petition for review is hereby GRANTED.

The appellant was an employee in the federal civil service in 1962 when he was voluntarily called to active duty in the United States Air Force. In 1979, the appellant retired from the Air Force and sought restoration to his former position. The agency denied his request and appellant appealed to the Board.

The right to appeal to the Board from an agency's failure to restore after miliary service arises under 5 C.F.R. 353.401. That section states that a veteran seeking to return to the civil service may appeal to the Board if he or she has a right to restoration under 38 U.S.C. 2021 or 2024(a), (b), and (c). As the initial decision correctly found, there is no appeal right created by regulation or the statute itself under 5 U.S.C. 3551. Thus, the presiding official initially had jurisdiction in this case for the limited purpose of determining whether the appellant had a restoration right under 38 U.S.C., thus giving rise to a right to appeal concerning the merits of the agency's action under 5 C.F.R. 353.401(a)(i) thru (iv).

In his initial decision, the presiding official properly applied 38 U.S.C. 2024 in determining that appellant had no right to restoration under that statute. The appellant has not disputed that finding.

Accordingly, having no right to restoration, the appellant had no right to appeal to the Board. Thus the Board has no jurisdiction over the appellant's related discrimination complaint because the personnel action complained of was not appealable to the Board, either under 5 U.S.C. 3551 or 38 U.S.C. 2024. *See* 5 C.F.R. 1201.151(a).

The Board hereby AFFIRMS the initial decision issued on April 21, 1980, as modified by the terms of this Opinion and Order.

This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CECILIO POLIDO
v.
U.S. DEPARTMENT OF THE AIR FORCE

Docket No.
RB752B90053

OPINION AND ORDER

The Petition of May 23, 1979 to the Merit Systems Protection Board to reopen and reconsider this case is DENIED.

In reviewing requests to reopen cases of this type, the Board is required to apply the review standards previously established by the Civil Service Commission under Section 772.312 of Title 5, Code of Federal Regulations. The information submitted does not establish that any of the regulatory criteria set forth in the regulations has been met.

The December 12, 1978 appellate decision of the Appeals Review Board set forth a complete discussion of the issues and the applicable law relevant to this case. As noted by the Appeals Review Board, the appellant's military service between 1942 and 1946 in the Philippine Army was not qualifying for the purpose of veterans preference eligibility. The conclusion by the Appeals Review Board was correct, in finding that the appellant's removal from an excepted service appointment position, without entitlement as a veterans preference eligible, was not within the purview of appellate jurisdiction of the former Civil Service Commission.

The appellant's submission in his petition are neither new and material, nor do they tend to show error in the decision of the Appeals Review Board.

The request to reopen this case, therefore is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal, and exhausts the appellant's administrative appeal rights in this case. Any further remedy available lies within the federal court system.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROGER DEAN ROSSEBO
v.
DEPARTMENT OF COMMERCE

Docket No.
CH075209023

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on November 28, 1979, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The appeal to the field office was dismissed by the presiding official on the basis that the Board does not have authority to review agency grievance decisions. In his petition for review, the appellant argued that the presiding official misinterpreted the issue and that he had intended to raise the allegation that he had been removed from his position. Appellant's assertion, that he prudently accepted a position in another agency after he failed to be selected for a position he had applied for in his employing agency, does not amount to a charge that he left his position involuntarily.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RAMON R. SANCHEZ
v.
DEPARTMENT OF JUSTICE

Docket No.
SF075209024

ORDER

The petition for review is GRANTED, and the decision in the above-styled case is REVERSED and REMANDED to the San Francisco Field Office.

The appellant, in his submissions to the Field Office, raised an allegation of discrimination, apparently based upon national origin. However, the presiding official did not decide this issue. Since the issue of discrimination was raised in this appeal, this action should have been processed as a "mixed case" under 5 U.S.C. 7702. 5 U.S.C. 7702(a)(1)(B) includes among mixed cases those actions in which the appellant alleges "that a basis for the action was discrimination prohibited by (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16c). . . ." In reconsidering this case, the presiding official shall fully consider and decide all discrimination issues raised by the appellant.

Further, the presiding official, in determining that the appellant had notice of the regulations he allegedly violated, relied on evidence dated after the alleged misconduct. Thus, the presiding official is directed to determine whether, based on other evidence, the appellant had actual and timely notice of the conduct regulations prior to the alleged misconduct.

Because the record contains evidence insufficient to permit a proper determination of the issues raised herein, the presiding official shall, on remand, decide those issues pursuant to a hearing.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSEPH A. SEAVELLO v. DEPARTMENT OF THE NAVY	Docket No. SF075299039

OPINION AND ORDER

The appellant was demoted from the position of Supervisory Electronics Engineer, GS-13, to Mechanical Engineer, GS-12, by the Naval Air Rework Facility, North Island, San Diego, California, based on charges of (a) misuse of manpower; (b) misuse of government property; and (c) misuse of government facilities. Specifically, it was alleged that the appellant directed three subordinates to produce advertising posters for a business he owned at the time.

The appellant appealed to the San Francisco Field Office. The presiding official issued an initial decision finding that ". . . a preponderance of circumstantial evidence supported the charge . . ." with respect to five of the posters. The presiding official then discussed the credibility of a witness and concluded ". . . that the charge concerning the remaining posters . . . is not supported by a preponderance of the evidence." Nonetheless, the initial decision affirmed the demotion on the basis of the sustained portion of the charge.

In the petition for review, the appellant asserted that the initial decision was based on an erroneous interpretation and application of statute (5 U.S.C. 7701(c)(1)(B)) and regulation (5 C.F.R. 1201.56(c)(2)). The appellant contended that the presiding official erroneously and improperly considered the evidence in an inconsistent manner and failed to consider the whole of the evidence.

The Board has held that mere expression of disagreement with the presiding official's conclusions is insufficient to warrant review of the initial decision. *Weaver v. Department of the Navy*, 2 MSPB 297 (1980). When, however, a petition for review identifies the specific evidence which allegedly was improperly considered by the presiding official and gives the reasons for this view, for example, by citing internal inconsistencies or inherent improbability in the evidence relied on, the petition does satisfy the *Weaver* test for granting review. The Board finds that the petition in this case does contain such a detailed discussion, and review is GRANTED.

At the outset, the Board notes that there is not one charge in this case, as the initial decision would seem to indicate, but three charges all stemming from basically the same set of facts. Accordingly, the presiding official erred in sustaining the "charge" on the basis of a finding that the appellant had directed the production of five of the twelve posters.

As discussed in the initial decision and in the petition for review, there are serious problems with the credibility of witnesses in this case. The events on which the charges were based took place in the fall of 1976. The investigation of the matter was initiated in November of 1978, after an attorney representing Mr. James Leland, appellant's coworker, furnished information to the agency. The record contains no hint as to Mr. Leland's motivation for furnishing the information when he did since it appears he had known of it all along. The record does reflect that Mr. Leland had received a letter of caution from the appellant in May of 1977. This fact coupled with the animus reflected in Mr. Leland's statement to agency investigators would support an inference that Mr. Leland orchestrated the disciplinary action against the appellant for personal reasons.

Mr. Walter Braidot is the individual alleged to have performed the bulk of the work ordered by the appellant. It is undisputed that Mr. Leland instructed Mr. Braidot to recover his work from the premises of the beauty shop once owned by the appellant so that it could be used, in part, as evidence in the action against the appellant. Mr. Braidot testified that he recovered all but two of the agency exhibits at that location. The remaining two posters, he said, were "masters" and were recovered from a map case at the agency where they had been stored.

The appellant presented evidence, however, which directly refutes Mr. Braidot's testimony with respect to recovery of the posters from the beauty shop. First, he called the operator of the beauty shop at the time he owned it who testified that none of the posters admitted as agency exhibits had ever been in the shop. The presiding official diminished somewhat the weight of this individual's testimony because she admitted to being the girlfriend of the appellant. Consistent with her testimony, however, is the fact that her name is Evelyn and the shop was named, during the time the appellant owned it, "Atomic Beauty Shop" and "Evelyn's Hair Fashions." As she pointed out, she would have no use, then, for several of the signs, in fact the ones dismissed from consideration by the presiding official, which referred to "Shirley's Beauty Shop."

Even more damaging to the credibility of Mr. Braidot is the testimony of Ms. Rosalia Oberlies, the current owner of the beauty shop and the individual who purchased it from the appellant. Ms. Oberlies denied that any of the posters had ever been at her shop and that Mr. Braidot had ever contacted or visited her concerning recovery of them. The presiding official found Ms. Oberlies a completely credible witness inasmuch as she had paid cash for the store, and, therefore, presumably, had no interest in the outcome of appellant's case.

In the face of this evidence, the Board finds the testimony of Mr. Braidot and the statement of Mr. Leland lacking in credibility. We note, in this regard, the presiding official's citation of record evidence that Mr. Braidot had said that he was helping Mr. Leland "build a case" against appellant. All ten of the posters alleged to have been recovered at the beauty shop by Mr. Braidot, therefore, are entitled to no weight as evidence in support of the charges. The remaining two posters are "master" price lists for an unnamed beauty shop. The agency alleged that they never left its premises and were recovered there. Their validity is not, then, suspect because of a reference to "Shirley" or because of their alleged recovery at Ms. Oberlies' shop. The problem of Mr. Braidot's diminished credibility, however, exists even with respect to these posters since he is the individual who claims to have recovered them. There is no evidence to corroborate his claim. In the Board's view, it would be inconsistent to find Mr. Braidot's testimony sufficiently credible in this instance to uphold the validity of the remaining two posters as evidence against the appellant.

Accordingly, the Board finds that, while some or all of the posters may represent work performed at the agency, as several witnesses testified, they cannot be considered evidence of work requested by the appellant because our findings with respect to their recovery reflect that they were not found by Mr. Braidot, as alleged.

The specific descriptions of charges b and c rely heavily on the existence of the posters for support. Accordingly, the Board finds that these charges cannot be sustained. Charge a, misuse of manpower, states only that appellant directed three subordinate employees to produce advertising posters for his beauty shop. In fact, the appellant has qualifiedly admitted that he did. The appellant disputed the number of hours, listed in the charge, which each of the employees estimated he spent on the project.

Testimony of agency witnesses is persuasive that official time was spent in the fall of 1976, by agency employees producing signs for the appellant's personal use. Such a request of one's subordinates is, of course, actionable. The only evidence of the amount of time expended are the estimates of the employees who performed the work. By far, the greatest amount of time alleged to have been spent by an employee was reported by Mr. Braidot.

Before the Board, then, is some evidence of misuse of manpower by the appellant in 1976. We find this evidence to be insufficient to support the charge (a) that was prepared by the agency. We also find the case against the appellant irrevocably tainted by personal animus and testimony lacking in credibility. Upholding the disciplinary action under these circumstances would not promote the efficiency of the service.

For these reasons, the initial decision is hereby REVERSED. The agency is ordered to CANCEL the action to demote the appellant and furnish evidence of compliance with this decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board on this case. 5 C.F.R. 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this Order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Olive K. Shane
v.
Department of the Army

Docket No.
DC752B70051

Order

The Petition of April 4, 1979, requesting the Merit Systems Protection Board to reopen and reconsider this case, is DENIED.

The record shows that the Washington Field Office of the Federal Employee Appeals Authority, after a hearing, affirmed appellant's removal. It decided that the agency complied with the procedural requirements of the applicable Civil Service regulations in effecting the appellant's separation, that a transfer of function occurred as alleged by the agency, that the appellant was properly identified with the functional transfer, and that the appellant failed to accompany her function to the new location. The Field Office decision was affirmed, upon reopening and reconsideration under 5 C.F.R. 772.310 by the Office of Appeals Review, which fully considered and discussed the issues pertinent to the adjudication of this case.

In reviewing requests to reopen cases arising under 5 C.F.R. Part 752 before January 11, 1979, the effective date of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111, the Board is required to apply the review standards established by the Civil Service Commission under 5 C.F.R. 772.312 (1978). The Board finds, upon review, that the written argument or evidence submitted by the party requesting reopening does not tend to establish that "the previous decision of the Board on a request to reopen and reconsider involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners."

The request to reopen this case is, therefore, DENIED.

This is the final order of the Merit Systems Protection Board in this appeal, and exhausts the appellant's administrative appeal rights in this case. Any further remedy available lies within the federal court system.

For the Board:

Robert E. Taylor,
Secretary.

Washington, D.C., *November 20, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ANTHONY J. CAPORALE v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION	Docket No. DC075209016

OPINION AND ORDER

The appellant, Anthony J. Caporale, petitioned the Washington, D.C., Field Office of the Merit Systems Protection Board for appeal of the allegedly erroneous classification of his former GS-14 Project Manager position with the agency, the National Aeronautics and Space Administration. He claimed that, after he was reassigned to another GS-14 position, he learned that his former position had been reclassified at the GS-15 level within 2 weeks after he left it. The agency responded with the explanation that the responsibilities of the appellant's former position were substantially increased after he was reassigned. The presiding official dismissed the appeal for lack of jurisdiction over a classification appeal.

The appellant then petitioned the Board for review of the initial decision dismissing his appeal. He contended that the personnel actions he was appealing were inconsistent with the merit system principles. In addition, he alleged for the first time that those personnel actions were the result of age discrimination.

We find that this appeal was properly dismissed for lack of jurisdiction. As indicated in the initial decision, classification appeals are properly filed with the agency involved or with the Office of Personnel Management. 5 C.F.R. 511.604. Absent an action otherwise appealable to the Board, an allegation of discrimination does not confer jurisdiction on the Board. *Smith v. Department of Health, Education, and Welfare,* 3 MSPB 3 (1980).

In responding to the original petition for appeal, the agency explained that the appellant had functioned in his former position as the agency's development and contracting manager for a cooperative project with the Italian government, the corresponding interests of which were managed by an Italian official. After the appellant was reassigned, the agency continued, his former Project Manager position was redesigned so that the incumbent now handles the development and contracting interests of both the agency and the Italian government. The agency concluded that the duties of the present Project Manager position are broader and more complex than those of the appellant's former position. Although he was in possession of the position descriptions for both his former position and the present position, the appellant did not challenge this factual representation either before the presiding official or in his petition for review. We find, therefore, that the appellant's reassignment to the present Project Manager position would have been a promotion to which he had no absolute entitlement. *Lange v. Department of Transportation*, 2 MSPB 110, 111 (1980).

The facts of this case clearly would not support an argument that the appellant was subjected to a constructive reduction-in-grade. Thus, we need not decide here whether the Board would have jurisdiction, pursuant to 5 U.S.C. 7512 and 7513, over an agency's action in reassigning an employee from a position which is subsequently reclassified at a higher grade without a significant change in duties.

Accordingly, the petition for review of the initial decision dated October 31, 1979, is hereby DENIED.

This is the final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this Opinion and Order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SUZANNE FOECKLER AND LAURA L. FRITSCH	Docket No. CH075209015 Docket No. CH075209014
V. VETERANS ADMINISTRATION	

ORDER

These cases are hereby consolidated, 5 U.S.C. 7701(f)(1) and 5 C.F.R. 1201.36, and the petitions for review are hereby GRANTED.

Following their resignations from employment, appellants submitted an appeal to the Board's Chicago Field Office, dated September 5, 1979, in which they requested a hearing. An appellant has a right to a hearing before the Board in connection with matters which are appealable to the Board. 5 U.S.C. 7701(a) and 5 C.F.R. 1201.24(c). While a resignation voluntarily initiated by the employee is not generally appealable, an involuntary resignation is tantamount to removal, which is appealable, and a nonfrivolous allegation of the involuntariness of a resignation warrants a hearing on that issue. *See Goodman v. United States*, 358 F.2d 532 (D.C. Cir. 1965) and *Spiegel v. Department of the Army*, 2 MSPB 307 (1980).

Accordingly, the initial decisions in these cases, which were issued without benefit of the requested hearings, are hereby VACATED and the cases are REMANDED to the presiding official for hearing and a new adjudication.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 21, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LYLE R. JARZE
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DC075209009

OPINION AND ORDER

The issue before the Board is whether attorney's fees were properly awarded against the Department of the Air Force in a case where the Board's Washington Field Office reversed the removal of Lyle R. Jarze. The Director of the Office of Personnel Management has petitioned the Board for review of the attorney's fees award on the basis that the presiding official applied the wrong statutory standard in view of the facts. The presiding official found that the agency decision to remove appellant was clearly without merit despite its reasons for the action because it failed to follow the clear mandate of its regulations.

The appellant, an employee of the Department of the Air Force, at the Federal Computer Performance and Simulation Center (FEDSIM) since 1973, was removed on July 14, 1979, based on specific instances of misconduct occurring in May of 1979. Despite his supervisor, Dr. Yen W. Chou's request that he come to work, appellant was absent without leave from Friday, May 18 until Tuesday, May 29, 1979. When he returned, Mr. Chou questioned him as to his absence to which appellant responded, "Put me on leave." When Mr. Chou told him that his leave had not been approved, appellant answered, "Put me on AWOL, I don't care I have money." Appellant then left the office.

On May 31, 1979, appellant called both Mr. Chou and Mr. Jim Stanton threatening to kill them. Later in the afternoon, appellant drove his car into the agency parking lot blocking Mr. Chou's car and waited for him. Mr. Chou and Mr. Stanton then registered a criminal complaint against appellant who was arrested later that day for threatening bodily harm.[1]

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[1] Although the agency decision was not based on prior incidents of this nature, the proposal to remove appellant referred to prior incidents occurring in August of 1978, in determining the severity of the penalty. On August 7, 1978, appellant had gotten visibly angry when the FEDSIM Commander, Col. Igelman refused to write him a letter granting him permission to look for another job, and said to him, "When the Air Force gets straightened out, you'll be dead." On August 10, 1978, appellant entered Colonel Igelman's office threatening to shoot him, if he did not give him the letter and $10,000 to cover appellant's living expenses.

Appellant timely appealed the removal to the Board admitting the charges but contending that the agency proceeded improperly in removing him because of his mental illness without applying for disability on his behalf. After the hearing, the presiding official concluded that the agency had substantial evidence that the employee's conduct was due to a mental disability and thus should have directed another fitness for duty examination in 1979, before instituting the removal action.

The presiding official rejected the agency's contention that its action in this case was reasonable since appellant was examined in November, 1978, and was determined fit for duty. He concluded that, in view of appellant's prior history of mental illness dating from 1976, which was known to his supervisors, "any reasonable person . . . would reach the conclusion that such conduct was the result of mental illness."

In an addendum decision dated April 1, 1980, the presiding official granted appellant's motion for attorney's fees as the prevailing party in the amount of $1,010.00. He concluded that the amount of attorney's fees was reasonable.

I.

In reviewing the presiding official's conclusion that the agency decision was clearly without merit, we have carefully studied the record to determine whether the agency acted reasonably in light of prevailing law and the facts then known to it in moving forward with its proposal to remove the appellant. There can be no doubt that the agency did not act in bad faith in proposing to remove appellant whose undisputed misconduct at various times since 1976 impaired the efficiency of the service. Appellant's supervisors demonstrated compassion and tolerance toward him, at times, helping him when he got into trouble and seeking to obtain medical treatment for him when he experienced relapses. Indeed, as in *Doe v. Hampton*, 566 F.2d 265, 274 (D.C. Cir. 1977), the agency may have subordinated "its legitimate interests in the efficient performance of its tasks and in maintaining a satisfactory level of office morale" for a period of time "in order to accommodate and help ameliorate appellant's unfortunate emotional problems."

However, the absence of good faith, or *bad faith*, is not a requisite to an award of attorney's fees to a prevailing employee under 5 U.S.C. 7701(g)(1). In *Allen v. United States Postal Service*, 2 MSPB 582 (1980), we held that although agency "bad faith" in initiating an adverse action proceeding warrants an award, an award may also be justified absent "bad faith" where the agency decision was "clearly without merit" or was "wholly unfounded". *Id.*, 593. We also said that circumstances where "the agency 'knew or should have known that it would not prevail on the merits' when it brought the proceeding" would also justify an attorney's fees award. *Id.*, 593.

In carefully reviewing the facts of this case which were known to the agency through appellant's supervisors and its Director of Civilian Employees' Health Service, we are compelled to find, as the presiding official found, that "such conduct was the result of mental illness" and that the agency removal action was initiated in disregard of the prevailing law and Federal policy. That policy required that the agency seek first to place the plaintiff on involuntary disability retirement, if necessary, before seeking to remove him on this basis.

Here, the agency proposal for removal itself recognized that appellant's actions, which were the basis for the agency action, raised the issue of his competency, but it determined that he was competent without any substantial basis in fact. Six days after the final agency decision to remove him, the agency's medical director recommended his disability retirement based on the appellant's mental illness.

While it is true that appellant's supervisors may have been confused by the fact that appellant had been continually discharged and allowed to return to work by his physicians after being committed, this did not excuse the agency from ordering another fitness for duty examination or instituting involuntary disability proceedings in view of the overwhelming evidence that his conduct was caused by mental illness before proceeding with the removal action. Cf. *Doe v. Hampton, supra*, 566 F.2d at 278-284. As the presiding officer found, "any reasonable person" would have believed that the misconduct was due to mental illness.

Then applicable regulations provided that the agency first proceed in that fashion. FPM Supplement 831-1, subchapter S10-2a (May, 1978) provided:

> The employee must apply for disability retirement, except in the following cases:
>
> > (1) When an agency considers acting upon deficiencies in an employee's service caused by a possible health problem, and if the employee refuses to apply, the agency may apply for him or her.

That this was intended to be mandatory rather than directive (See *Doe v. Hampton, supra*, 566 F.2d at 281) is shown by FPM Supplement 831-1, subchapter S10-5b (May, 1978), which said, in part:

> The agency should, if the disabling condition is mental, file a disability retirement application on behalf of the employee.

> Under the rule laid down in *Anderson v. Morgan*, 263 F.2d 903, and 39 Comp. Gen. 89, it is an error to separate for disability reasons the 5-year employee whose mental condition impairs his or her judgment and ability to make decisions without first applying for disability retirement on his or her behalf, and any separation of this kind is subject to cancellation.[2]

In *Piccone v. United States*, 407 F.2d 866 (Ct. Cl. 1969), which was decided more than ten years before the agency's removal proposal, the court held that where a civilian employee was separated before the Civil Service Commission decision on his disability retirement, because of his physical limitations which restricted him from performing his duties, the removal was invalid as contrary to agency regulations and thereby procedurally defective. See also *Doe v. Hampton*, *supra*, 566 F.2d at 280-284. Thus, at the time that the agency proposed appellant's removal, it was well-established that an agency must abide by its own regulations in authorizing the removal of one of its employees. *Service v. Dulles*, 354 U.S. 363 (1957).

In light of the ample evidence that appellant's misconduct was due to mental illness and established law that the agency would not prevail contrary to regulations at the time that the removal was initiated, we must conclude that the agency action was "totally unfounded" and "clearly without merit."

We therefore hold that the presiding official's award of attorney's fees correctly applied the statutory standards.

II.

We are puzzled by the presiding official's finding in determining that the amount of attorney's fees ($1,010.00) was reasonable, that the case presented novel issues in light of his finding, which we affirm, that the agency action was "wholly unfounded." Since the law was well established at the time of the agency decision that it would not prevail because it was procedurally defective, that finding is erroneous. However, our review of the submission of the appellant's attorney in connection with his motion for fees leads us to conclude that $50.00 is a reasonable hourly rate for such an able Alexandria, Virginia, attorney, and 20.20 hours is a reasonable amount of time for him to spend in telephone conferences, researching, preparing for the hearing and participating at the hearing. Thus, we find that $1,010.00 is a reasonable fee, as found by the presiding official, despite the absence of novel legal issues presented by this case.

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[2] 5 C.F.R. 831.1206 (October 8, 1969) which was in effect when the agency proposed removal provided that until the decision on the agency application by the Civil Service Commission (now Office of Personnel Management) was received, the employee was to be retained on active duty unless that would be "detrimental to the interests" of the agency, "or injurious to the employee, his fellow workers, or the general public," in which case the employee was to be placed on voluntary or involuntary leave. See also FPM chapter 339, subchapter 1-3 (October 3, 1975).

III.

Accordingly, the petition for review is GRANTED. The Award of attorney's fees in the amount of $1,010.00 contained in the addendum decision is AFFIRMED. The agency is ORDERED to furnish evidence of compliance to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MANMOHAN SAHNI
v.
GOVERNMENT OF THE DISTRICT
OF COLUMBIA

Docket No.
DC035109029

OPINION AND ORDER

Appellant was separated from his position as an Economist with the D.C. Department of Labor by reduction-in-force (RIF) procedures. The presiding official of the Board's Washington, D.C. Field Office affirmed the agency's action, and appellant petitioned for review. Appellant's petition is GRANTED.

I. BACKGROUND

Appellant's position was in the excepted service, and was partially funded by the U.S. Department of Labor pursuant to an Occupational Safety and Health Program Grant. The agency requested termination of the grant for fiscal year 1980, and applied RIF procedures to appellant's position because of the consequent lack of funds.

Appellant alleged that the RIF had been improperly motivated and taken for reasons personal to him. He also alleged that required procedures had not been followed.

The record shows that appellant had criticized the agency and his supervisor, Mr. Greene, to various D.C. Government officials, and that Mr. Greene was aware of appellant's activities. *See* the agency's response to the appeal, written by Mr. Greene, *infra*. The presiding official dismissed the allegation that the RIF had been taken in reprisal for these activities, because appellant had "submitted no evidence to show that his allegations were ever found meritorious by any of the officials who heard his complaints."

In addition, the presiding official stated that since appellant's rights on appeal concerned procedural matters, appellant had the burden of showing harmful error in the application of the procedures, citing 5 U.S.C. 7701(c)(2) and 5 C.F.R. 1201.56.

II. DISCUSSION

The Board finds the reasoning of the initial decision to be erroneous both in interpreting the pertinent RIF regulation and in allocating the burden of proof. The initial decision is inconsistent with our later decision, *Losure v. ICC*, 2 MSPB 361 (1980), in which we addressed the issue of the proper allocation of the burden of proof in RIF cases. Accordingly, the Board will reconsider this case in light of our decision in *Losure*.

Reduction-in-force actions are governed by Chapter 35 of Title 5, U.S. Code. The circumstances under which a RIF may be justified are set out at 5 C.F.R. 351.201(a): "lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights." The agency presented a *prima facie* showing that it conducted a RIF for a legitimate management reason, *i.e.*, shortage of funds. However, the Board will not allow the circumvention of adverse action procedures where the agency's stated reason is in reality a pretext for summary removal. *Losure, id.; Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

As we stated in *Losure, supra*, 366:

> If the employee presents no rebuttal evidence to challenge the *bona fides* of the agency's alleged reason for the RIF, the agency's initial evidence would normally suffice to meet also the agency's burden of persuasion on this element of its decision. Once the agency makes out a *prima facie* case, the burden of going forward with rebuttal evidence shifts to the employee but the burden of persuasion (more precisely the risk of non-persuasion) never shifts from the agency. Thus, where credible evidence, either in the employee's rebuttal presentation or in the agency's own admissions, is sufficient to cast doubt on the *bona fides* of the RIF, the agency may find it advisable to present additional evidence to meet its burden of persuasion. But whether the agency presents such additional evidence or not, the burden remains on the agency to persuade the Board by a preponderance of the evidence that the RIF regulations were in fact invoked for one of the legitimate management reasons specified in 5 C.F.R. §351.201(a).

In this case we find that there is sufficient credible evidence, in appellant's rebuttal and in the agency's own admissions, to cast doubt on the *bona fides* of the decision to invoke RIF procedures, as well as on the manner in which that action was taken.

Appellant alleged, and the record demonstrates, that there was animosity between him and Mr. Greene. (*See* Appellant's Exhibit 1). Appellant conducted an informal, on-going grievance, mainly against Mr. Greene, which he took before various D.C. government officials. By August, 1979, his complaints had reached Mayor Marion Barry. The record demonstrates that Mr. Greene was aware of this fact. When he (Greene) wrote the agency's response to appellant's appeal, he stated:

> (i)t should be noted that Mr. Sahni has had ample opportunity to voice his allegations of lack of proper management, gross and chronic under-utilization of existing manpower resources, mismatch of job duties and available skills, the illegal interference with the performance of an independent program, the shielding overall incompetence and inefficiency. Mr. Sahni has had the freedom, with my full knowledge and permission to talk to the members of the D.C. Minimum Wage and Industrial Safety Board, the Acting Directors of the D.C. Department of Labor, and to Mayor Marion Barry. This he has done without any further action being taken or recommendations being made by these responsible officials with whom he had the opportunity to voice his complaints.

Mr. Greene's letter withdrawing the agency from the Grant Program for fiscal year 1980, and appellant's Notice of Separation, were dated August, 1979, as was a letter from appellant to Mayor Barry criticizing Mr. Greene and requesting reassignment. Appellant also alluded to an adverse evaluation of him written by Mr. Greene. (H.T. at 65). The record of animosity between appellant and Mr. Greene, considered in conjunction with other circumstances in this case, raises at least an inference that appellant's separation by RIF procedures was for reasons personal to him, and thus improper. *See Losure, supra.*

Appellant alleged that he should have been assigned to a vacant position rather than separated. He produced evidence of vacancies, had applied for one position before being separated, and was carried on the competitive senior level register; however, concerning the agency's reason for not assigning him, one agency witness testified:

> based on the information that we had here, as far as your citizenship was concerned, for positions in the competitive service, you would not have been eligible, because for competitive service positions you do have to be a United States citizen. (H.T. at 21).

In fact appellant, who had been born in India, was a United States citizen. He had twice so informed the agency; once by letter in 1976, the year he was naturalized, and again in May, 1979 when he responded to the agency's order for up-dated SF-171's. (*See* H.T. at 16-17). The agency witness explained:

> yes, I am aware of the 171's that were reworked. All employees were required to update their 171's and submit it to Personnel. However, they were not found in official personnel

> folders, because at the time they were used for different, you know, reporting purposes, so there was a special purpose for those, and they have not, to this day, gone into the folders. (H.T. at 16).

For that reason, the agency consulted appellant's 1971 SF-171 form, rather than his up-dated one, in order to determine his eligibility for positions within the agency. Consequently, in the Notice of Separation the agency stated, "(w)e have not been able to identify a vacancy for which you qualify." Because of this error, the agency has failed to show that it made a proper determination of appellant's entitlement under the RIF regulations. *See Losure,* 365, n. 5, which places the burden of proof in this respect on the agency.

Although the above testimony indicates that *no* employee's up-dated SF-171 form was consulted prior to the RIF, and although the initial indication was that one other employee was also affected (H.T. at 8), we note that appellant stated that he was the only one out of the program who was out of a job. (H.T. at 65). The agency has not stated that any other employee was removed or demoted pursuant to the RIF. Accordingly, the agency's error, while it was applied evenly, had a deleterious effect only on the appellant.

In short, although the agency knew that it had ordered up-dated SF-171 forms just three months previous to appellant's RIF, it chose to ignore his up-dated form for what we find to be a flimsy reason, at best. This casual attitude toward appellant's official records, considered along with the evidence of animosity between appellant and Mr. Greene, tends to demonstrate that appellant's separation was the agency's actual goal. However, the error is so serious that the agency's actual motivation in the matter is not of controlling importance.

The agency's failure to maintain current records also violates the spirit of the RIF regulations; 5 C.F.R. 351.505 provides, *inter alia,* that in RIF actions,

> (e)ach agency shall maintain the current, correct records needed to determine the retention standing of its competing employees.

This requirement is spelled out in greater detail in FPM Chapter 351-A-1 (November 20, 1964; revised July, 1969):

A-1-a. provides, *inter alia,*

> (a)n agency must maintain at all times the records necessary to determine the retention standing of its competing employees.

A-1-b. provides, in pertinent part, that

> (t)he basic information needed to determine retention preference in a reduction in force is described below. . . . The agency must make any determinations necessary to establish these records.

A-1-b. (8) concerns the employee's competitive status and provides,

> (t)he record must show whether the employee has competitive status. If so, it should show how it was obtained. It also should show whether the employee is serving with a competitive status. This information is needed to validate the nature of current employment and to determine rights of employees serving in excepted positions to participate in the Displaced Employee Program.

In this regard, we note that the presiding official asked the agency's witness on matters of procedure whether the D.C. government had its own provisions for assignment rights of excepted service employees. The witness responded that excepted service employees were not entitled to priority placement (H.T. at 22). Appellant, who appeared *pro se* at the hearing, did not then rebut that testimony. However, the accuracy of that response has now been placed into question by appellant's petition for review, to which the agency has not responded.

Specifically, appellant's newly retained counsel points out that:

> (t)he D.C. Government's regulations governing reductions-in-force are found at DPM-20. Section B of these regulations defines the District's Displaced Employee Program, which specifies that
>
> > "a. It is the policy of the District Government to utilize vacancies to the extent possible in minimizing the adverse impact of a reduction in force on employees. . . . The placement of employees under this program *is required* whenever a suitable vacancy exists, there is no restriction on filling the position, and the employee is qualified." (Emphasis added.)
>
> The program is to be applied without regard to competitive area, if necessary (Section b), and "applies to all departments, agencies and organizational components under the administrative jurisdiction of the Mayor. Department heads . . . *are required* to establish and administer a displaced employee program in their respective departments in accordance with these guidelines" (Section c). (Emphasis added).

Absent rebuttal by the agency, we find that it has failed to show that its action was proper in these respects.

III. CONCLUSION

We conclude that although the agency showed, *prima facie*, that it had taken the RIF action for a reason permitted by regulation, the *bona fide* nature of its decision has been rebutted by a strong inference that the agency's motivation was actually personal to appellant. Even without that inference, the action must fail because the agency, for whatever reason, failed to keep *and consult* the records which the RIF regulations require, and which determine appellant's entitlement to continued employment. Accordingly, the agency has failed to carry its burden of proving, by a preponderance of the evidence, that the RIF regulations were in fact properly invoked for one of the legitimate management reasons specified in 5 C.F.R. 351.201(a). *See Losure, supra.*

Accordingly, its is ordered that:

1. The initial decision dated January 16, 1980 is reversed;
2. The District of Columbia Department of Labor is directed to cancel the personnel action separating Manmohan Sahni;
3. Within ten (10) days of the date hereof, the D.C. Department of Labor shall file with the Board's Washington, D.C. Field Office written verification of its compliance with paragraph (2) of this Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 21, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSEPH E. AGNES
v.
U.S. POSTAL SERVICE

Docket No.
DA075299019

OPINION AND ORDER

The appellant was removed from a position with the U.S. Postal Service, Dallas, Texas, for failure to meet the attendance requirements of his position. He appealed to the Board's Dallas Field Office. The presiding official found the charge supported by a preponderance of the evidence and sustained the appellant's removal. In his petition for review, the appellant contends that the presiding official improperly interpreted the terms "totally disabled" and "partially disabled" as used in 5 U.S.C. 8105 and 8106. The agency filed no response.

The appellant suffered a job-related injury on December 30, 1976. He has essentially not performed Postal work since that time. In February 1979, the agency contacted a physician who had previously examined the appellant to determine the appellant's ability to perform in specified limited duty assignments. On February 12, 1979, the agency received a communication from the doctor which indicated that the appellant would be able to perform in either of the limited duty assignments described. The appellant was notified that he should, therefore, report for work as of the next day, February 13, 1979. The appellant did not report for work, but instead submitted a statement from his doctor that he was unable to work on February 13, 1979, and would be unable to work for at least six to eight more weeks. The agency disregarded this statement, allegedly on the advice of the Department of Labor, Office of Workers Compensation Programs, because it was not from the physician of record, and on February 23, 1979, proposed the appellant's removal for failure to report for work. Throughout the processing of the appeal, the appellant has contended that he is totally disabled and cannot work and that he has not reported for work on his doctor's orders. He argues that the presiding official has erroneously interpreted 5 U.S.C. 8105 and 8106 and the case law on the meaning of the terms "total" and "partial" disability. The Board views this as an argument that the presiding official erred in finding that the appellant's failure to report for work from February 13 through February 22, 1979, constituted a proper cause for adverse action. The appellant appears to believe that if he can be found "totally disabled" as defined in case law then he had no obligation to report for work. To this end, the file contains a number of medical statements regarding the appellant's ability to work. The presiding official gave little weight to the February 13, 1979 medical statement because, "while indicating generally that appellant was unable to work for approximately 6 to 8 weeks, it does not speak specifically to the appellant's ability to perform the duties of the limited duty position." Initial decision, page 5.

The Board does not find that the issue in this case is whether the appellant can be labeled "totally" or "partially" disabled. Rather what is at issue was appellant's specific physical ability at the time he was ordered to report to work to perform the duties of the limited assignments proposed by the agency. In this case, the appellant presented a number of medical opinions indicating that he was unable to work. We cited above the presiding official's reason for not finding the statement of February 13, 1979, persuasive. We find the presiding official's reasoning in this regard to be erroneous. Dr. Winslow, who prepared the February 13, 1979 statement, apparently submitted the statement in response to a request from the appellant for a medical statement supporting his stated inability to work on February 13, 1979. Dr. Winslow stated therein:

> "This patient came to my office on December 29, 1978, with a diagnosis of posterior sacral rotation on the right side and with a loose posterior sacral ligament on the right side. I recommended at that time that this patient have proliferation therapy. He is unable and will be unable to work until this injection therapy is completed, which will be approximately 6 to 8 weeks."

This doctor had not been asked to evaluate the appellant's ability to perform in specified limited duty assignments. The Board, therefore, finds it erroneous to discount his statement because it does not contain such an evaluation. We find further error in the presiding official's failure to consider at all the agency's stated reason for discounting the statement.

As stated *supra,* the agency disregarded the February 13, 1979 letter from Dr. Winslow because he was not the "physician of record." It is presumed that this is the Department of Labor record to which the agency refers. The appellate record before this Board reflects that until July 1978, the appellant was seeing Dr. Gordon Baker. On June 23, 1978, Dr. Baker completed a form for the agency indicating that the appellant would be able to begin a limited duty assignment. After working less than 4 hours on each of about 2 days, the appellant stopped working, claiming that his back and neck condition were being aggravated. At about this time, Dr. Baker was killed. The agency then wrote the Department of Labor questioning the appellant's inability to work even a limited assignment. In response, the Department of Labor arranged for Dr. Kenneth Glass to examine the appellant. This was accomplished on July 24, 1978. Dr. Glass submitted a lengthy report. As a result of this report, the Department of Labor found the appellant unable to return to either "regular or light work." This was conveyed to the Postal Service by letter dated November 22, 1978. In February 1979, the Postal Service then contacted Dr. Glass for a determination of the appellant's ability to perform the specified limited duty assignments. From the above sequence of events, the Board finds it evident that the appellant had not been asked by either the Department of Labor or the Postal Service to furnish a statement from his own doctor between July 1978 and February 1979. Therefore, they may not have been aware that Dr. Winslow was treating the appellant. Nonetheless, by February 1979, the prior physician of record was deceased and Dr. Glass was involved only as an impartial medical examiner acting at the request of the Department of Labor. Accordingly, the Board finds that Dr. Winslow's statement is worthy of consideration. Upon review, we find that Dr. Winslow's opinion should be given greater weight than the February 12, 1979 statement of Dr. Glass. Dr. Winslow had been seeing the appellant weekly since December 28, 1978. Dr. Glass had seen the appellant once and that was July 24, 1978, some six and one half months prior to the Postal Service request in February 1979.

The record also reflects that the position to which the appellant was to report was the same one he had tried on the recommendation of Dr. Baker. On Monday, February 12, 1979, the appellant was notified to report to work the next day. By that day, he had contacted Dr. Winslow and Dr. Winslow had submitted his statement regarding the appellant's condition. The Board finds that the appellant has reasonably cooperated with the Postal Service in submitting certification of his disability. We further find that the preponderance of the evidence indicates that the appellant was disabled for the period February 13, 1979 through February 22, 1979. Therefore, the agency's action removing him for failure to report to work during this period was not taken for such cause as would promote the efficiency of the service.

Accordingly, the petition for review is GRANTED. The initial decision is VACATED and the agency action is REVERSED. This is a final decision of the Merit Systems Protection Board. The agency is hereby ordered to cancel the action removing the appellant and to furnish a copy of the personnel action form documenting compliance with this Order to the Board's Dallas Field Office within 10 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HILBERTO ALONZO v. DEPARTMENT OF THE AIR FORCE	Docket No. DA075209013
ROBERT COEFIELD v. DEPARTMENT OF THE NAVY	Docket No. SF075209012
RUDOLPH D. RUSSELL v. DEPARTMENT OF THE INTERIOR	Docket No. SF075209018

OPINION AND ORDER

By Order of November 13, 1979, the Board reopened these cases to address the issue of whether "good cause" had been shown to justify a waiver of the Board's requirement that appeals must be filed not later than twenty (20) days after the effective date of an appealable action. 5 C.F.R. 1201.22. Each appellant failed to appeal from his removal within the aforementioned 20-day time period. In all three cases, appellants attempted to invoke 5 C.F.R. 1201.12 which provides that a presiding official may waive a Board regulation in an individual case upon a showing of "good cause." In each of the cases, the presiding official found that good cause was not shown to justify a waiver of the time limitation. Accordingly, the appeals were dismissed as untimely filed. The cases were consolidated by the Board upon reopening, since they contain identical or similar issues. 5 C.F.R. 1201.36.

I. FACTUAL BACKGROUND

Appellant Alonzo was removed from his position effective July 16, 1979, and appealed to the Dallas Field Office by letter postmarked August 9, 1979. The appellant stated that his appeal was four days late because he was denied union representation by the refusal of management officials to release an individual to act as his representative. In the initial decision of October 17, 1979, the presiding official noted that the appellant was personally responsible for filing the appeal in a timely manner and that the record failed to establish that the union had no one who could represent the appellant. The presiding official concluded, therefore, that the explanation offered did not establish that the appellant was prevented by circumstances beyond his control from appealing within the time limit.

By letter postmarked August 20, 1979, appellant Coefield appealed his removal effective April 16, 1979, to the San Francisco Field Office, contending that he was prevented from filing a timely appeal due to various physical and mental conditions. Specifically, he claimed that he had been suffering from severe depression, anxiety, and a somatic condition and that he was unable to deal adequately with his legal and financial affairs. The presiding official, in his initial decision of October 17, 1979, noted that the attempted appeal was more than three months late, but that appellant had contacted and consulted with an Equal Employment Opportunity Counselor and investigator of the agency during the appeal period. Thus, the presiding official concluded that if appellant had been able to visit agency personnel regarding EEO matters pertaining to his employment, there was no reason why appellant could not have sought assistance or filed an appeal on his own behalf. He further found that appellant had not shown circumstances that reasonably prevented him from effectively filing an appeal within the regulatory 20-day limit.

Appellant Russell, who was also removed from his position, filed an appeal one day late, claiming that the delay was caused by poor mail service, and lack of communication between him and his representative because of the distance involved. The presiding official noted that the appellant was properly notified of the time limit and that good cause was not shown for accepting the appeal. Thus, he dismissed the appeal as untimely filed.

II. DISCUSSION

The Board must consider the competing interests involved in deciding when the 20-day time limit should be extended. There are strong policy considerations that employees be given a hearing on the merits of their cases and that they be ensured a fair opportunity to secure from the Board an independent review of agency action. On the other hand, the Board also recognizes that there is a need for finality in personnel actions. In its analysis of the changes in appeals procedures created by the Civil Service Reform Act of 1978, the Senate observed:

> The changes protect the right of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case. At the same time, they are intended to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct,

or whose work performance is unacceptable. (S. Rep. No. 969, 95th Cong., 1st Sess. 51 (1978)).

We agree with OPM (which filed a brief as intervenor) that the time limit affords a system that expedites the administrative resolution of employee appeals and ensures basic fairness. In short, "good cause" is an elastic concept, *see Dinko v. Wall*, 531 F. 2d 68 at 75 (2nd Cir. 1976). It entitles the employee to the application of the broad equitable principles of justice and good conscience.

The Board's regulations include no specific criteria for determining when good cause has been shown for waiving the time limitation on the filing of an appeal. Section 1201.12 of the Board's regulations gives the presiding official wide discretion in determining whether a sufficient basis has been shown by an appellant which warrants a waiver of the time limitation. The presiding official must exercise his judgment in determining whether there has been an articulation or presentation of facts reasonably excusing the failure to file a timely appeal. The particular circumstances of each case must govern the determination of the presiding official. Nonetheless, factors for consideration by a presiding official in deciding whether to waive the 20-day limitation should include, but are not necessarily limited to, the following: the length of the delay; whether appellant was notified of the time limit or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected his ability to comply with the time limits; the degree to which negligence by the appellant has been shown to be present or absent; circumstances which show that any neglect involved is excusable neglect;[1] a showing of unavoidable casualty or misfortune;[2] and the extent and nature of the prejudice to the agency which would result from waiver of the time limit.[3]

If the employee gives a reasonable excuse for the delay, such excuse should be accepted by the presiding official, absent a showing of substantial prejudice to the agency caused by the delay in filing. The appellant need not show an utter impossibility, but only that the delay was excusable in light of the particular facts and attending circumstances where diligence or ordinary prudence has been exercised.

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[1] Excusable neglect must be based on more than mere forgetfulness. It may be shown if the neglectful behavior is such as might be expected on the part of a reasonably prudent person under the circumstances.

[2] This can be defined as that which could not have been prevented by the exercise of reasonable skill and diligence or human prudence or foresight.

[3] The presiding official should take into account whether the agency's ability to defend its action has been impaired by the failure of the appellant to appeal in a timely fashion. Such matters as the disposal schedule for pertinent documentation and the availability of employees with knowledge of the action are factors to be considered. Likewise, there may be legitimate management considerations mitigating against undertakng the adjudication of a case which the agency reasonably has considered closed.

Applying the aforementioned factors and the varying circumstances of each case to be weighed by the presiding official, we shall now consider the explanations offered by the appellants.

Alonzo contended that the delay in filing his appeal was due to the unavailability of his representative. In a written statement, Alonzo claimed that his supervisor had led him to believe that his union representative could no longer represent him once he had received a final agency decision. By the time this confusion was cleared up, the appeal had been delayed four days beyond the time limit. Alonzo, in our judgment, has made a sufficient showing that circumstances beyond his control prevented a timely appeal. Moreover, the agency has not alleged, nor does the record reflect, that it was prejudiced by the short delay in filing.

Russell's letter of appeal to the Field Office was postmarked one day late. His representative claimed that he was contacted by the appellant for assistance on the 19th day of the time limit for appeal. The appeal letter allegedly was prepared and mailed on the 20th day, but, because mail is processed only once a day at the small post office where the appeal was mailed, it was not postmarked until the 21st day. These contentions are unrebutted anywhere in the record. By regulation, the Board has provided that, if the time limit for appeal ends on a weekend or Federal legal holiday, the last day for filing is the following day. 5 C.F.R. 1201.23. The circumstances of this case present an analogous situation. Accordingly, the Board finds that Russell has presented an acceptable reason for his late filing.

Therefore, we find that in the cases of Messrs. Alonzo and Russell, a proper basis for waiver of the time limitation was presented. Thus the presiding officials abused their discretion by not concluding that a reasonable excuse or explanation had been offered for the late filings.

With his letter of appeal, appellant Coefield submitted a letter signed by a psychiatric resident, Veterans Administration Hospital, indicating that the appellant had been seen as an inpatient in July of 1979, and his diagnosis was adjustment disorder with anxious mood, depressed mood, and unspecified physical symptoms. The doctor stated that, in his judgment, the appellant had been unable to adequately deal with the legal and financial affairs of his life from late February 1979, until July 1979. In its response, the agency contended that the appellant had returned to conduct affairs at its Equal Employment Opportunity Office and to meet with an investigator on several occasions throughout that period. This was not denied by the appellant. The agency furnished the

Board a copy of a complaint of discrimination (with the substantive information deleted) which the appellant signed and filed on April 25, 1979, well within his time limit for appeal to the Board.

The record shows that the appeal he filed was three months late and the medical evidence submitted, when considered in light of the appellant's pursuit of an EEO complaint during this period, does not conclusively support a finding that appellant was prevented from appealing because of total or significant incapacitation. We are not persuaded that Coefield was incapable of filing a timely appeal or of authorizing his representative to file the appeal, absent more specific medical testimony. We conclude, therefore, that the presiding official did not abuse his discretion under these circumstances.

Generally, we believe that in cases such as these, any doubt about whether good cause has been shown should be resolved in favor of an appellant. In determining whether the agency was unduly prejudiced by the delay, we have balanced the equities involved, weighing the difficulties of the agency against the benefit to the appellant. *See Shiffler v. Schlesinger*, 548 F.2d 96 (3rd Cir. 1977); *Organizations United for Ecology v. Bell*, 446 F. Supp. 535 (1978). In the cases of Alonzo and Russell, the scale is tipped in their favor; the delays were excusable in light of their brevity and extenuating circumstances. On the other hand, the evidence in the Coefield case simply does not support a finding that for three months appellant was unable to file an appeal. The Board is unable to find that the presiding official abused his discretion in not finding "good cause" to waive the filing deadline in that case.

III. CONCLUSION

Based on the foregoing analysis, the Board concludes that the presiding official in Coefield did not abuse his discretion under 5 C.F.R. 1201.12, in determining that the appeal was not timely filed. Coefield has failed to show good cause for waiving the time limit for filing an appeal. Accordingly, upon reconsideration of the appellate record, the Board AFFIRMS the initial decision of October 17, 1979.

This is the final decision of the Board with respect to appellant Coefield, who is hereby advised that a civil action may be filed in an appropriate U.S. Court of Appeals or the U.S. Court of Claims within thirty days of receipt of this decision.

With regard to appellants Alonzo and Russell, the Board finds that good cause has been shown to justify waiving the Board's 20-day limitation. Accordingly, the initial decisions of October 17 and 19, 1979, are RESCINDED and the cases are REMANDED for further proceedings. We intimate no opinion as to the ultimate merits of these two appeals.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Hosea L. Burns v. Veterans Administration	Docket No. CH531D09005

Opinion and Order

Appellant, a Computer Programer, GS-11, step 1, appealed from a reconsideration decision of the agency which sustained a determination to withhold the within-grade step increase for which he was eligible on July 1, 1979.

The agency alleged that its determination was based on extensive documentation of appellant's performance deficiencies in productivity and accuracy, which indicated that the quality of appellant's work was not of an acceptable level of competence (ALOC).

The presiding official found that the agency presented sufficient evidence to support its action by a preponderance of the evidence pursuant to 5 U.S.C. 7701(c) (1) (B).

Appellant alleged, in his request for review by the Board, that the presiding official incorrectly read important data in the appeal and based his decision on a condition that does not exist in the case.

Pursuant to 5 U.S.C. 5335, an employee occupying a permanent position subject to the General Schedule is entitled to periodic within-grade step increases, if his performance has been at an acceptable level of competence.

When a determination is made that an employee has not met the ALOC standard, the employee, subsequent to a reconsideration determination, has the right to appeal the determination to the Board. *See* 5 U.S.C. 5335(c); 5 C.F.R. 531.407(e); 5 U.S.C. 7701.

However, once an initial decision has been issued by a presiding official, the Board will undertake the burden of a complete review of the record only if the petitioning party has explained in the petition why the challenged factual determination is incorrect, and has identified the specific evidence in the record which demonstrates the error. *Claude Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

The Board finds that the petition for review merely reargues that which was argued before the presiding official, and asserts nothing more than appellant's disagreement with the presiding official's findings and conclusions. Hence, the instant petition for review does not meet the review requirement set forth in *Weaver, supra.*

The Board notes that the presiding official erred in applying the preponderance of evidence standard of proof in this case. The substantial evidence standard is the burden of proof which should be applied in ALOC determination cases. *See Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980).

Nevertheless, the Board finds that the application of the preponderance standard was not prejudicial to appellant since it merely placed a greater burden of proof upon the agency.

Upon further examination, the record reveals that the agency presented substantial evidence to support its determination to withhold appellant's within-grade step increase for failing to perform at an acceptable level of competence.

Thus, the Board finds that the regulatory criteria for review have not been met. *See* 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 24, 1980*

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UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROGER R. BUTTS
v.
DEPARTMENT OF THE TREASURY

Docket No.
AT075299014

OPINION AND ORDER

Appellant was terminated for unsatisfactory performance after serving less than one year under a veterans readjustment appointment with the U.S. Customs Service. He appealed his termination to the Atlanta Field Office of the Board alleging racial discrimination. The presiding official found that, because appellant had served for less than one year in an excepted appointment, he was not entitled to appeal to the Board under 5 U.S.C. 7511 or 5 C.F.R. 752.401.

The petition for review reiterated the allegation of racial discrimination and further alleged various improprieties committed by the agency in effecting appellant's removal. It also stated that the appeal was within the jurisdiction of the Board pursuant to 5 C.F.R. 772.310 and 772.312.[1]

Under 5 C.F.R. 307.105, an employee serving under a veterans readjustment appointment may be removed for unsatisfactory performance, but, if such an employee has completed one year of current continuous appointment, he is entitled to those rights conferred by 5 C.F.R. 432, which provides, *inter alia,* for a right of appeal to the Board. Since, however, appellant has served for less than one year, he has no right of appeal to the Board under 5 C.F.R. 432 or under any other regulation or statute. *See Metz v. U.S. Postal Service,* 2 MSPB 103 (1980). Therefore the petition fails to meet the criteria for review under 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

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[1] Part 772 of Title 5, C.F.R. is inapplicable to cases which arose on or after January 11, 1979, the effective date of the Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1111 (October 13, 1978). It has been superseded by 5 C.F.R. Part 1201.

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., ***November 24, 1980***

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

PEGGY J. COX
v.
U.S. INTERNATIONAL TRADE COMMISSION

Docket No.
DC075209042

OPINION AND ORDER

Petitioner was removed, effective September 7, 1979, from her position as Librarian with the Office of Data Systems, Office of Operations, U.S. International Trade Commission, Washington, D.C.

Her appeal to the Washington, D.C. Field Office of the Board was opposed by a motion to dismiss filed by the agency, which alleged that the appeal was filed on September 28, 1979, one day late, and was therefore untimely filed. In opposition to the motion, petitioner alleged that the agency misquoted sections 1201.21 and 1201.22 of Title 5 of the Code of Federal Regulations and that the example of computation contained in the agency's motion was not made available to her. Petitioner further alleged that she was absent from the area since early September, 1979, attending her terminally ill mother and that, for the two weeks immediately prior to the deadline for filing the appeal, her attorney was engaged in a trial.

The presiding official found that petitioner failed to show good cause for the untimely filing of the appeal, which was dismissed accordingly.

This petition for review is based on the allegation that the presiding official, in finding that petitioner failed to show good cause for a waiver of the time limitation required for filing, erroneously interpreted 5 C.F.R. 1201.12.

Petitioner strenuously argued on review that she was misled as to the actual time computation for filing because the agency presented her with a copy of the Board's interim regulations which were less clear than the final regulations. Section 1201.21(b) of the interim regulations provides in pertinent part as follows:

> The petition shall be filed in the designated place no later than twenty calendar days after the effective date of the agency action complained of, or the appellant's receipt of notice of the appealable action, whichever is later. . . .

Section 1201.11(b) of the final regulations states in relevant part as follows:

> Petitions for appeal must be filed anytime during the period beginning with the day after the effective date of the action being appealed until not later than 20 days of the effective date.

An example of time computation for filing purposes is afforded by section 1201.23 of the final regulations:

> If an employee receives a decision notice which is effective on June 1, the 20 days for filing starts to run on June 2. The filing must be made by June 21. If June 21 is a Saturday, the last day for filing would be Monday, June 23.

Petitioner contended that, had she been provided with the computation example in the final regulations, she "would have been alerted to the intent of the final regulation and not mislead (sic) by the imprecise language of the interim regulations." In fact, petitioner alleged that her counsel unsuccessfully sought clarification from the agency in determining the correct deadline for filing.

We find no ambiguity in section 1201.21 of the interim regulations. Further, section 1201.22 of those regulations provided a specific statement as to the manner in which the period for filing was to be computed. However, assuming arguendo that petitioner reasonably saw an ambiguity, the better course would have been for petitioner's counsel to seek guidance from the Board rather than from the agency. We further find that the revised language in the final regulation in no way constricts the period for the filing of an appeal; it simply restates the same rule in alternative language. Since, however, the computation example provided in the final regulation more clearly explained the time limitation for filing, and, since the agency failed to provide petitioner with a copy of that regulation, although it had been in effect since June 30, 1979, petitioner should be accorded the benefit of the doubt in this instance.

Petitioner further alleged that she was hampered in her communications with her attorney because she was required to leave the area in early September 1979, for the purpose of tending her terminally ill mother. The record indicates that the decision to remove was received by petitioner on August 29, 1979, and therefore, as stated by the presiding official, petitioner was afforded 29 days to file her appeal. Nevertheless, we find that the stress of caring for a terminally ill parent, when considered in light of petitioner's emotional condition and her recent dismissal from the agency, as well as the other circumstances of the case, constituted sufficient good cause to support a waiver of the time limitation here involved.

However, in regard to petitioner's contention that her counsel was unable to file a timely appeal due to the fact that he was conducting a trial during the period immediately preceding the filing deadline, we concur with the finding of the presiding official that that contention is without merit. Counsel's preoccupation with another trial was not an unusual situation which would support a finding of good cause pursuant to 5 C.F.R. 1201.12, and counsel has failed to submit any evidence which would convince us otherwise.

Consequently, we find that counsel's confusion as to the correct interpretation of the interim regulation erroneously provided by the agency as well as petitioner's absence from the area to care for her ill mother amount to sufficiently good cause as would here warrant a waiver under 5 C.F.R. 1201.12 of the interim regulations and section 1201.22(b) of the final regulations. The untimeliness with which we are here concerned was not excessive but was minimal, that is, a single day. Hence, we find that good cause has been shown under the circumstances of this case for the one day delay.

Accordingly, the petition for review is hereby GRANTED, the initial decision is VACATED, and the case is REMANDED to the Field Office for further processing consistent with this Opinion.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HENRY EIGLES
v.
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Docket No.
PH531D09016

OPINION AND ORDER

This case is before the Board on an agency petition for review of the initial decision issued on February 7, 1980. The agency alleges that the initial decision, reversing the agency's denial of appellant's within-grade wage increase, is based on erroneous interpretations of statutes and regulations. Having considered the petition and appellant's response thereto, the Board GRANTS the petition for review.

The initial decision found that the agency had committed harmful procedural error in denying appellant's within-grade increase, and reversed the denial. The presiding official reached that determination by interpreting and applying 5 C.F.R. Part 531 and HEW Personnel Instruction 531-4-50C.2. Both require that an employee be given notice 60 days in advance of the end of a within-grade increase waiting period if there is a question regarding the acceptability of the employee's level of competence. However, both the OPM regulation and the internal HEW regulation specifically state that failure to provide the advance notice will not delay the within-grade determination at the end of the waiting period. Both regulations also provide for a redetermination 60 days after the end of the waiting period when the requisite advance notice was not provided.[1]

In spite of the regulatory provisions for redeterminations when the advance notice was absent or faulty, the presiding official found that failure to communicate performance problems in advance was harmful procedural error requiring reversal of the agency's personnel action. The presiding official also found that the agency's compliance with regulations in providing the second determination did not render harmless the "error" of not providing advance notice.

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[1] The agency conducted a redetermination of appellant's level of competence, and issued a memorandum setting forth the results of that redetermination on September 6, 1979. The redetermination was, in turn, subject to reconsideration by the agency upon appellant's request. Although appellant has asserted that the redetermination was not valid because the memorandum was allegedly late, those issues are not before the Board. To challenge the second determination either procedurally or on the merits, the appellant must appeal the second reconsideration decision to the Board.

The basis for this finding was in an alleged procedural fault in the redetermination process and was not based on a finding of inherent inadequacy in the regulatory provisions. However, the procedural adequacy of the redetermination is not within the scope of this appeal of the agency's decision following reconsideration of the first determination.

The Board finds that the initial decision of February 7, 1980, erroneously interpreted 5 C.F.R. Part 531 and HEW Personnel Instruction 531-4-50C.2 in finding harmful procedural error in the agency's action denying appellant a within-grade increase. The regulations explicitly provide for alternate procedures in the event of failure to provide the 60 days advance notice. The agency, having failed to give the full 60 days advance notice, carried out the alternative procedure of redetermination.[2] Accordingly, failure to provide the advance notice was not harmful procedural error and the initial decision is hereby REVERSED.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 24, 1980*

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[2] As noted earlier, disputes over the procedural adequacy of the redetermination are not within the scope of this appeal.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CLARENCE FLEMING, JR. v. DEPARTMENT OF HEALTH AND HUMAN SERVICES	Docket No. DA531D09006

OPINION AND ORDER

Clarence Fleming, Jr., appellant, appealed to the Board's Dallas Field Office from the reconsideration decision denying his within-grade salary increase. After a hearing the agency action was affirmed. Subsequently, his attorney petitioned the Board for review of the presiding official's decision.

In the petition, appellant asserted that there is new and material evidence available which, in combination with evidence already submitted, proves that the agency arbitrarily decides whether to grant a step increase. The appellant also asserted that the presiding official misinterpreted the agency's guidelines concerning the job requirements which could be the bases for denying a step increase; that since the agency had not established the "essential elements" of appellant's position, it could not reach a conclusion as to his level of competence; and that the agency relied on unauthorized records, termed write-backs, in reaching the decision. Finally, he asserted that the denial of the step increase was due to his lack of "Title II"[1] experience, and that all persons without such experience are minorities.

The petition alleged that "appellant . . . became aware of the fact that his supervisor . . . granted a within grade increase to a Quality Review Specialist, who (the supervisor) admitted was not performing at an acceptable level of competence. . . ."[2] As the agency asserted in its response, the petition did not set forth any specifics concerning the asserted new evidence. Neither has the appellant submitted any further information.

The Board may grant a petition for review when it is established that "new and material evidence is available that, despite due diligence, was not available when the record closed." 5 C.F.R. 1201.115(a).

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[1] This reference is to cases processed under Title II of the Social Security Act, 42 U.S.C. 401, *et seq.*

[2] 5 U.S.C. 5335 authorizes a step increase for otherwise qualified employees if their performance is of an acceptable level of competence. 5 C.F.R. 531.401 *et seq.* sets forth the procedures to be followed by agencies in denying within-grade salary increases.

An allegation that new and material evidence is available must be supported by sufficient allegations of fact to enable the Board to decide whether thc allegation is sufficient to warrant the reconsideration of the case.

The petition for review fails to set forth sufficiently and specifically the alleged new and material evidence. The petition fails to identify the circumstances of the alleged admission, i.e., what was said. Neither the employee nor the particular circumstances surrounding his or her increase are identified. We cannot ascertain if the allegation has a basis in fact, or even if the other employee's circumstances are similar to this case. Moreover, the assertion is relevant only to appellant's allegation of discrimination, since applicable law and regulations require that a within-grade salary increase be awarded only to those employees who perform at an acceptable level of competence. Therefore, it is appellant's performance, not that of another employee, which is at issue. With respect to that discrimination allegation, as noted above, no specifics concerning the employee to whom appellant referred were included. He thus has not presented the Board with sufficient indication of the relevance and materiality of the alleged new evidence to warrant granting the petition for review. Finally, in this regard, even assuming that the evidence was particularly stated, it appears to be intended to impeach the supervisor's credibility and to bolster evidence already of record. Cumulative or impeaching evidence does not constitute new and material evidence. *Trans Mississippi Corp. v. United States*, 494 F.2d 770 (5th Cir. 1974).

Response to the other arguments advanced in the petition requires further discussion of the facts. The appellant is a quality review specialist. His job is to review a sampling of cases completed in various district and field offices for accuracy. Errors are recorded and by extrapolation the agency's effectiveness can be determined.

Appellant's work was normally reviewed by his supervisor. If appellant made an error, the supervisor would send the case back to him with notations (called write-backs) as to the error.[3] The write-backs sent to appellant during the rating period and the supervisor's testimony are the evidentiary bases for the conclusion that his work was not at an acceptable level of competence. Most of appellant's arguments contest the use of the write-backs; however, appellant did not dispute the errors represented by those write-backs.

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[3] This practice was applied somewhat differently depending on who reviewed the work. All reviewers said very minor errors did not require a write-back as they were verbally brought to the employee's attention. One reviewer said she rarely used write-backs. However, the reviewers consistently used write-backs when they felt it was necessary and there was no evidence that any reviewer used write-backs inconsistently among employees.

The appellant argued that the write-backs could not be used as an evaluation tool because he was not informed that they would be put to that purpose; that the write-backs were inconsistently handled; and that the agency did not prove it could retain the documents. The appellant also contended that the agency had not established that quality of work, by itself, was essential to performing at an acceptable level of competence, and therefore the write-backs could not adequately measure his competence.

The head of an agency is responsible for determining what constitutes an acceptable level of competence and he may delegate this responsibility, 5 C.F.R. 531.407(a)(1) and (2). The Personnel Guide for supervisors, issued by the agency, gives immediate superviors this responsibility. (Appellant's Exhibit No. 2). Notwithstanding appellant's argument to the contrary, the agency proved that quality of work is an essential element of the position of "Quality Review Specialist." Therefore, the decision to deny the increase due to lack of quality complied with agency and regulatory standards.[4]

The use of write-backs as a measure of performance violated no rule, regulation or policy. The agency included the write-backs in the reconsideration file as required by 5 C.F.R. 531.407(d)(4), and the appellant was afforded an opportunity to address the errors contained in the write-backs, both at the time he originally received them and in response to the withholding action. There is no requirement that an employee be told what devices may measure performance; it is required only that he know what performance is required of him. Appellant was informed that the quality of his work would determine whether the increase would be granted.

The appellant's claim of discrimination rested upon the allegation that he was hampered by his lack of Title II experience. The presiding official found that appellant had failed to establish that a lack of Title II experience affected the determination of his competence. Since the appellant has presented no new evidence in this regard we conclude he has not established a prima facie case of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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[4] The presiding official applied a preponderance of the evidence standard of proof to the agency's case. This was incorrect—an agency need only prove its denial was supported by substantial evidence. *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). However, since the incorrect standard placed a heavier burden on the agency, there was no harm to appellant.

The petition for review fails to establish that there is new and material evidence available, or that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Geraldine B. Frazier
v.
Defense Mapping Agency

Docket No.
DC075209100

Opinion and Order

Appellant filed her appeal one day past the regulatory time limit, and the presiding official found no reason to waive the limit.

A presiding official may waive a Board regulation in an individual case for good cause shown if application of the regulation is not required by statute. 5 C.F.R. 1201.12 (1980). Good cause may exist, in the case of procedural regulations, when the official finds sufficient reason to conclude that enforcement of the regulation is impracticable, unnecessary or contrary to the public interest. The strict enforcement of a procedural regulation may be waived when the procedural violation is minor and the other party has not shown harm by the failure to follow the regulation in question.

Here the appellant alleged that she was one day late in filing her appeal because she had not yet received certain documents which she felt were necessary to prosecute her appeal. The agency on the other hand has not shown that its interests would be prejudiced by a one-day waiver.

Accordingly, the petition for review is GRANTED, the initial decision issued on February 19, 1980, is REVERSED, and this appeal is REMANDED to the Field Office for consideration on the merits.

For the Board:

Ersa H. Poston.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALBERTA GARY
v.
DEPARTMENT OF AGRICULTURE

Docket No.
CH531D99002

OPINION AND ORDER

Petitioner appealed from a March 16, 1979 reconsideration decision of the Department of Agriculture, Food and Nutrition Service, Midwest Region, Chicago, Illinois, which sustained a determination to withhold her within-grade step increase for which she was eligible on January 28, 1979.

Petitioner was employed as a Secretary-Stenographer, GS-512-06, Step 9, at the time of the denial of her within-grade step increase.

In the initial decision, the presiding official held that the authority of the Board set forth in 5 C.F.R. 531.407 does not extend to a review of the merits of the withholding action, but is limited to a determination of 1) whether a valid basis exists for the negative acceptable level of competence (ALOC) determination; and 2) whether the withholding action was processed in accordance with the procedures outlined in 5 C.F.R. 531.407.

He therefore found, without further analysis of the record, that the reconsideration file which cited numerous performance deficiencies and provided supporting documentation established a valid basis for the agency's negative determination. He also found that proper regulatory procedures were adhered to in the determination.

Petitioner alleged in her request for review by the Board that her negative ALOC determination resulted from her supervisor's animosity, and his prejudicial and discriminatory practices against her.

Pursuant to 5 U.S.C. 5335, an employee occupying a permanent position subject to the General Schedule is entitled to periodic within-grade step increases if his/her performance has been at an acceptable level of competence during the applicable waiting period.

When a determination is made that an employee has not met the ALOC standard, the employee, subsequent to a reconsideration determination, has the right to appeal the determination to the Merit Systems Protection Board. *See* 5 U.S.C. 5335(c); 5 C.F.R. 531.407(e); 5 U.S.C. 7701.

In *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980), the Board held that the mere fact that an agency's decision is appealable to the Board does not limit the Board's scope of review to that of an appellate court. The Board additionally said that nothing in 5 U.S.C. 5335(c) limits the employee's right of appeal to a review of the agency's reconsideration file.

5 U.S.C. 5335(c) expressly provides for appeals that result in a reversal of the earlier determination, making it plain that it is the negative ALOC determination that is the subject of the appeal, not the reconsideration proceeding, the exhaustion of which is but an administrative prerequisite to the appeal. *Parker, supra,* 498.

Upon an examination of the record, it appears that the presiding official limited his consideration to the reconsideration file alone. Moreover, it is unclear whether the presiding official gave any consideration to petitioner's specific refutations and supporting documentation within the reconsideration file, or whether the decision was based only upon the agency's cited performance deficiencies and supporting documentation.

The Board finds that the initial decision rendered by the presiding official, using a "valid basis" standard, constitutes an erroneous interpretation of law and regulation concerning the Board's scope of review and the agency's burden of proof, as set forth in *Parker.* Accordingly, the Board hereby GRANTS the petition.

The Board in *Parker* held that the agency's burden of proof in ALOC determination cases is the substantial evidence standard. We, therefore, have carefully considered all of the appellate record in light of this standard, and upon a thorough examination of the record, we find that the agency did present substantial evidence to support its determination to withhold petitioner's within-grade step increase for failing to perform at an acceptable level of competence. The documentation of record fully supports the deficiencies cited as basis for the withholding action, and the agency's proof clearly meets the standard of substantial evidence as defined in our regulations at 5 C.F.R. 1201.56(c)(1) and in *Parker, supra.*

Accordingly, the initial decision dated June 15, 1979, is REVERSED in its finding on the agency's burden of proof, but AFFIRMED in its finding that the agency's determination to withhold petitioner's within grade step increase was warranted.

This is the final decision of the Merit Systems Protection Board. Petitioner is hereby advised of her right to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SIMMIE E. HENSLEY
v.
DEPARTMENT OF THE ARMY

Docket No.
AT075209065

OPINION AND ORDER

The employee was removed from the position of USAR Recruiting Specialist and was suspended during the notice period of that action based upon a charge that he shot his former wife. The presiding official affirmed the suspension but held that the agency had not supported the removal action by a preponderance of the evidence. The agency petitioned for review of the initial decision.

The record establishes that the employee had been hospitalized intermittently for psychiatric problems and abuse of alcohol and drugs. Agency officials were not only well aware of this, but, on at least one occasion, the employee's supervisor was instrumental in convincing the employee that he was "out of control" and should admit himself to the hospital. The record shows that the agency had investigated and was "closely monitoring" the employee's conduct. The Board finds that the agency had ample reason for believing that the employee was suffering from mental and/or physical disorders.

Under these circumstances, when the shooting incident[1] occurred the agency had the option of proposing the employee's removal for cause or filing for his disability retirement. In *Anderson v. Morgan*, 263 F.2d 903, it was held that an agency should proceed first to retire an employee on a disability annuity. In the Board's judgment, when an agency has knowledge that an employee may be mentally impaired, and, therefore, unable to rationally consider filing for disability retirement on his own behalf, it is incumbent upon the agency to file for him before proceeding with a removal action.

Accordingly, the Board finds that the suspension and removal actions in the employee's case were improper because the agency did not first file an application for his disability retirement. The initial decision is hereby REVERSED as to the suspenson action and AFFIRMED, as MODIFIED herein, as to the removal.

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[1] It is undisputed that the appellant's former wife was shot while appellant was visiting her. The appellant claims that she was shot during a struggle between them for a gun. There were no witnesses to the incident.

The agency is hereby ORDERED to furnish evidence of compliance with this decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

The right of the employee to seek judicial review of the Board's action is specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WARREN KUMMER
v.
DEPARTMENT OF THE TREASURY

Docket No.
PH035109006

OPINION AND ORDER

Warren Kummer, an Industrial Electronic Mechanic (WG-11) with the United States Mint, Department of the Treasury, Philadelphia, Pennsylvania, has petitioned for review of an initial decision of the Philadelphia Field Office of the Merit Systems Protection Board, which affirmed the agency's July 29, 1979, reduction in force (RIF) affecting the appellant, among others. The appellant, who was a Machinist (WG-11) before the agency's RIF action, has requested that the initial decision not be made final pending an on-site desk audit of his present position, and that the August 3, 1978, decision of the former Civil Service Commission's Federal Employee Appeals Authority, which reversed the appellant's reduction in grade, be included in the Board's review.

In the initial decision dated November 8, 1979, the presiding official noted that the evidence of the eight original appellants and the arguments of their attorney related to the bona fides of the RIF. They had established that since the RIF action, the agency had offered and sometimes required overtime by the appellants; that several of the appellants were performing many of the same duties after the RIF as they did before, despite the change in their position titles; and that several of the appellants had been detailed back to their former positions. The presiding official found, however, that none of these facts was probative as to the bona fides of the RIF.

Since the RIF had been recommended by the former Civil Service Commission in the first place in order to implement the proposals of a task analysis that the Commission had conducted, the presiding official found that the RIF was taken for legitimate organizational reasons and not because of personal animus against the appellants. The August 3, 1978, decision of the FEAA reversing the appellant's reduction in grade confirmed that RIF, rather than adverse action, was the proper procedure for effecting the necessary changes. The presiding official found, further, that the matter of the thoroughness and accuracy of the job evaluation analysis, also raised by the appellants, was not a matter ordinarily within the jurisdictional purview of the Board. The presiding official concluded, therefore, that the appellants had not met their burden of proving that the agency subjected them to the RIF for reasons personal to them.[1]

In his petition for review, Mr. Kummer did not allege that he has discovered new and material evidence, or that the decision of the presiding official was based on an erroneous interpretation of statute or regulation, as must be established for the Board to grant such a petition for review of an initial decision. 5 C.F.R. 1201.115. The appellant's petition, therefore, does not meet the regulatory criteria of the Board for review of the initial decision dated November 8, 1979.

The appellant's petition contained a concomitant request for review of the August 3, 1978, FEAA decision reversing his reduction in grade. Since this request occurred some sixteen months after the FEAA decision was rendered and since that decision was not adverse to the appellant, the Board declines to reopen the matter at this time. We assume, in any event, that the request for review of the decision was intended as a submission of background information rather than an actual request for reconsideration.

The appellant asserted in his petition that the task analysis or job classification and position description, upon which the RIF was based, were erroneous. However, even if that allegation can be proved, it is not a basis for appealing a RIF action to the Board under our regulatory authority pursuant to 5 C.F.R. 351.901.

An agency's RIF action may be appealed to the Board under that provision only on the basis that the RIF action was not taken in accordance with the regulations set forth at 5 C.F.R. 351.201, *et seq.*, which have no specific position classification requirements. The regulations require simply that the RIF provisions be followed when a release of an employee from his or her competitive level is required by, *inter alia*, a reclassification due to change in duties. 5 C.F.R. 351.201(a).

The agency RIF action being appealed involved such a reclassification, as well as a reorganization. However, the appellant's petition did not challenge the bona fides of the agency's RIF action on the basis that he is performing the same duties and discharging the same responsibilities now as he did before the RIF. His allegations related, instead, only to the accuracy of the classification of his position. In the case of wage employees like the appellant, such classification appeals may be properly filed with the agency first, and then with the Office of Personnel Management, pursuant to 5 C.F.R. 532.701, *et seq. See* 5 U.S.C. 5346; *Bookman v. United States*, 453 F.2d 1263, 1267 (Ct. Cl. 1972).

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[1] While we have found this shifting of the burden of proof in RIF appeals to be improper, *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), we find from our review of the record on appeal in this case that the agency met its burden of proving that "... the RIF regulations were properly invoked due to management considerations of the character appropriately committed to agency discretion." *Id.*, 366.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby advised of his statutory right under 5 U.S.C. 7703 to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of receipt of this decision by the Board.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LOUIS J. MEADE
v.
DEPARTMENT OF THE TREASURY

Docket No.
CH531D8010088

OPINION AND ORDER

Appellant was denied a within-grade salary increase based on the agency's determination that he was not performing at an acceptable level of competence (ALOC). The initial decision reversed the action because of findings that the agency: (1) committed harmful procedural error, and (2) failed to support its reasons for the denial by the preponderance of the evidence. The Board, by Order dated April 22, 1980, reopened and remanded the case for a new adjudication in light of its decision in *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). *Parker* held that: (1) the mere possibility of prejudice was not sufficient in arriving at a finding of harmful error, and (2) the standard of proof applicable in an ALOC case was that the agency's negative determination must be supported by substantial evidence. The Field Office thereafter provided both parties an opportunity to supplement the record, advising the parties, in pertinent part, that "evidentiary material submitted following the initial decision (attached to a petition for review) must be moved into evidence on remand." Appellant subsequently filed submissions on May 19, June 2 and June 30, 1980. The agency made no supplemental submissions. The initial decision, issued on August 30, 1980, found that the agency had not met its burden of showing that the negative ALOC determination was supported by substantial evidence and, accordingly, reversed the action.

The agency petitioned the Board for review, contending that the presiding official erred in failing to consider evidentiary material attached to its prior petition to the Board. It argued that the presiding official apparently considered the appended material analogous to an indictment and, therefore, not constituting evidence of the charges contained therein. The agency asserted that the appended material should instead have been considered analogous to the appeal file in an adverse action and the necessity for "moving into evidence" obviated. Appellant responded to the petition but did not address the agency's contention.

The evidentiary material at issue consisted of a Report of

Investigation based on charges by appellant that certain agency officials had engaged in corrupt and criminal activities. While the report dealt primarily with appellant's allegations, certain of the exhibits did reflect on appellant's performance. Nonetheless, and although the report had been prepared many months prior to the original Field Office adjudication, it was not placed into the record during that proceeding. The report did not, as such, constitute "(n)ew and material evidence . . . that, despite due diligence, was not available when the record was closed," as required by 5 C.F.R. 1201.115, nor had the Board relied on the report as a basis for the order reopening and remanding the case to the Field Office. Under the circumstances, it was well within the presiding official's proper exercise of his authority under 5 C.F.R. 1201.41 to notify the parties that this evidentiary material would be excluded from consideration unless moved into evidence. 5 C.F.R. 1201.62. The agency neither complied with nor objected to the presiding official's ruling. Moreover, the fact that the agency may not have properly prosecuted the appeal cannot serve as a valid basis for granting the petition for review. 5 C.F.R. 1201.115.

Finally, the Board notes that the agency's argument that the presiding official apparently considered the appended material analogous to an indictment is a clear misreading of the initial decision. The only document which was analogized to an indictment was the agency's February 2, 1979, negative ALOC determination. As concerns the evidentiary material at issue, the presiding official simply stated: "the agency was advised of its right to move any such material into evidence by my May 15, 1980 letter and has not done so." Initial Decision at 2.

The Board, having fully considered the agency's petition for review of the initial decision issued on August 26, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
MANUEL MUNOZ
AND
HANS M. MARK, SECRETARY
U.S. DEPARTMENT OF THE AIR FORCE

Docket No.
HQ120800016

ORDER

On October 27, 1980, the Office of Personnel Management moved for reconsideration of the Board's October 3, 1980, Opinion, insofar as that opinion holds that the Board has the authority to stay agency actions taken prior to the issuance of the stay.

The statute at issue provides that a stay may be issued where there are "reasonable grounds to believe that the personnel action *was taken*, or is to be taken, as a result of a prohibited personnel practice."[1] Thus the statute clearly contemplates the Board's authority to stay an agency action after its effective date. "[T]he language of a statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). It is axiomatic that departure from the literal meaning of a statutory provision is appropriate only "where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute. . . ." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 361, 643 (1978), quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965), and *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941). But, as the Supreme Court stated in *Helvering v. Hammel*, 311 U.S. at 511:

> [C]ourts are not free to reject [the literal or usual] meaning [of a statute] where no such consequences follow and where . . . it appears to be consonant with the purposes of the [statute] as declared by Congress and plainly disclosed by its structure.

In this case, the literal meaning of section 1208(a) is consistent with the purposes of the Civil Service Reform Act of 1978. The purpose of the stay mechanism under the Act is to allow the Office of Special Counsel time to investigate and, if appropriate, seek corrective action. *In the matter of Kass*, 2 MSPB 251 (1980) at 256. The stay relieves the pressure which might otherwise be exerted on the Special Counsel to conduct an abbreviated investigation and make a hasty prosecutorial decision in order to alleviate any hardship to the employee. By the same reasoning, if the Acting Special Counsel were forever precluded from bringing a stay by the action's having taken effect, she might forego attempts to resolve the situation informally prior to seeking a stay.[2] Thus, to interpret Section 1208 as applying only to future personnel actions would frustrate the obvious purpose of the statute.

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[1] 5 U.S.C. sec. 1208(a)(1) (emphasis added).

The structure of the statute lends further support to the Board's interpretation of the meaning of 5 U.S.C. sec. 1208(a), since there is comparable language in 5 U.S.C. sec. 1206(a)(1) and (3), which gives the Special Counsel authority to conduct investigations to determine "whether there are reasonable grounds to believe that a prohibited personnel practice *has occurred,* exists, or is to be taken." (Emphasis added).

Certainly, there may be situations where the lapse in time is such that a stay would be inappropriate under the circumstances. Such is not the case in the action presently before the Board.

Since the language of the statute is clear, it would serve no useful purpose to permit further briefing by the parties on its meaning. Accordingly, the motion of the Office of Personnel Management for reconsideration is DENIED.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 25, 1980*

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[2] 5 C.F.R. sec. 752.404(f) (1980) provides that an agency must inform employees against whom an adverse action is taken of their appeal rights. No corresponding provision exists to ensure that employees are aware of their right to seek assistance from the Acting Special Counsel. One would therefore anticipate that the employees' complaints to the Office of the Special Counsel may in some instances be slower than their resort to other remedies.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TIMOTHY P. ROOKEY
v.
DEPARTMENT OF HEALTH AND HUMAN
SERVICES

Docket No.
CH531D09010

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on January 18, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

We note that the presiding official used a preponderance of the evidence standard in considering the merits of this case. In *William Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), the Board held that the substantial evidence standard is the correct standard of proof for "acceptable level of competence" cases. However, because the standard required by the presiding official in this case was higher than that required, the appellant was not harmed by the use of the incorrect standard. We also find that the appellant did not show harmful error as established in the *Parker* case.

Therefore, the initial decision of January 18, 1980, is REOPENED and MODIFIED in accordance with this Order and the initial decision of the presiding official to dismiss the appellant's appeal is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOHN L. BANDY
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075209043

OPINION AND ORDER

Appellant was removed from his position of Rigger with the Navy Public Works Center on the following charges: (1) unauthorized absence on May 7 and 14, 1979; and (2) being on duty under the influence of intoxicants on May 2, 3, and 4, 1979. The presiding official at the San Francisco Field Office affirmed the agency action in an initial decision dated November 28, 1979. In this Petition for Review, appellant contends that the presiding official was biased in favor of the agency; that he failed to correctly assess the credibility of certain witnesses; that he improperly permitted an agency witness to testify in contravention of FPM Chapter 792, subchapter 5; and that he incorrectly found that the agency had complied with the letter and spirit of "specific public laws relating to the Alcohol Abuse Program." The agency responded that the petition for review does not meet the criteria set forth in 5 C.F.R. 1201.115.

Appellant's contentions concerning the alleged bias of the presiding official represent no more than a disagreement with his analysis of the facts and/or an assertion that he incorrectly ruled on certain objections to the introduction of evidence made by appellant's representative at the hearing. These are clearly insufficient to establish bias. *Oliver v. Department of Transportation,* 1 MSPB 368 (1980); *In re John W. King,* 1 MSPB 144 (1979). Similarly, appellant's disagreement with any credibility determination made by the presiding official does not constitute sufficient grounds for granting the petition for review. *Weaver v. Department of the Navy,* 2 MSPB 297 (1980).

Appellant's next argument concerns the presiding official's alleged error in admitting the testimony of a Mrs. Lenore England over the objections of appellant. Mr. England was a coordinator for the Employees' Assistance Program at the Center. The purpose of EAP was to aid employees whose personal problems, including alcohol and drug abuse, were having an adverse effect on job performance. Records of employees with alcohol or drug problems must be kept confidential in accordance with the legal requirements of section 333 of Pub. L. 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970. 42 U.S.C. 4582.

At the hearing before the presiding official, Mrs. England testified that she was contacted by appellant's supervisor to provide assistance on May 2, 1979. She further testified that appellant "smelled of alcohol. . . . He had problems with his words. . . . His face was flushed and he was not in very good shape." (Tr. 40, 41.) Appellant objected to her testifying in general, and to the above cited portions of her testimony in particular. He alleged that any contacts Mrs. England had with appellant were confidential. The presiding official warned the witness of the possibility that certain testimony might be confidential (Tr. 39), but stated in response to appellant's objection to the above testimony that "the witness is perfectly entitled to state their [sic] observances." (Tr. 40.)

Clearly, the objection to any testimony by Mrs. England was premature and the presiding official was correct in overruling it. Her appearance as a witness was approved based on the agency's representation that she would testify concerning her role in the oral reply and as an EAP coordinator. Neither of these areas, on their face, fall within the appellant's objection on the basis of the confidentiality requirements of the Act.

The specific testimony of Mrs. England, objected to by the appellant, is another matter. The Board finds, though, that, even assuming the presiding official erred in overruling the objection to Mrs. England's observations of appellant's condition, the charge is still sustained. Sufficient evidence was presented, without Mrs. England's testimony, to support the charge of intoxication while on duty. Therefore, the error alleged by the appellant is immaterial to the outcome of this case.

Finally, appellant alleges that the agency failed to follow the intent of Public Law 91-616 in that it removed him after he participated in an Alcohol Rehabilitation Program based on situations that occurred before his participation in the Program. He argues that he was entitled to a further trial or probationary period. The record reflects, however, that appellant declined several offers of EAP assistance in 1978 at the time he was suspended for being under the influence of intoxicants on duty. At the time of the incidents on which the removal is based, the appellant declined several additional offers. Finally, on May 25, 1979, the appellant agreed to participate in a treatment program. He did complete the initial program but failed to continue with follow-up treatment recommended for him. (Tr. 79-82.) Under these circumstances, the agency has met its responsibilities to the employee under Public Law 91-616.

Based on the foregoing, upon review, the initial decision is AFFIRMED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM A. BROWN v. DEPARTMENT OF THE AIR FORCE	Docket No. DC035199011

OPINION AND ORDER

Appellant's petition dated September 13, 1979, requesting that the Board review the August 10, 1979 initial decision of the presiding official, DC035199011, is GRANTED.

Appellant, a competitive service employee, was a Traffic Programs Advisor, GS-13, for the Air Force. On September 22, 1978, he was informed that the function which he performed would be transferred from Washington, D.C., to Kirtland Air Force Base, New Mexico, effective December 23, 1978. Appellant was afforded the opportunity to continue in what the agency termed the same position at the new location. On October 27, 1978, appellant declined that offer.

The agency then attempted to find a vacant position for which he qualified, and also registered him under the Department of Defense Priority Placement Program. On February 28, 1979, the agency offered him the position of Security Specialist, GS-12, in Washington, D.C., which he accepted on March 5, 1979.

By his appeal dated March 26, 1979, appellant alleged that his position had been modified as a result of a reorganization, and that his grade-controlling duties had not transferred to Kirtland, but had remained in Washington, D.C. Appellant cited the subsequent downgrading of the vacant position at Kirtland AFB to a GS-12 as support for his allegations, and he thus alleged that the agency violated the applicable reduction-in-force regulations.

By affidavits, the agency asserted that appellant's grade-controlling duties did transfer, that even if reduction-in-force procedures had been undertaken at the Washington, D.C. agency, appellant's best job offer could have been the position which he was in fact offered and which he did accept, and that appellant's sole remedy, as a member of a bargaining unit, was the negotiated grievance procedure.

The presiding official dismissed the appeal as not within purview, in that the personnel action in question was neither a reduction-in-force nor an adverse action.

The petition for review alleges that the presiding official erred in not considering whether appellant was properly identified with the transfer of function, and in not granting the requested hearing.

The question of whether the negotiated grievance procedure was appellant's sole avenue of relief need not be determined in view of our disposition of this case.

The presiding official correctly decided that there is no right of an appeal from a transfer of function *per se*, and that only an adverse action or reduction-in-force resulting therefrom would be appealable. When an employee refuses to transfer with his function, the agency may remove that employee under adverse action procedures. Although the agency may also apply reduction-in-force procedures to the employee, it is not obligated to do so. *See Baldwin v. United States*, 175 Ct. Cl. 264, 270 (1966), *cert. denied*, 385 U.S. 1064 (1967).

Appellant's claim that he had been improperly identified in the transfer of function could have been adjudicated in two instances: if he had accepted the transfer and then undergone a reduction in grade, or, if he had refused the transfer and also refused the lower-graded position which he did accept in lieu of adverse action. In the latter instance, the subsequent removal procedures would have provided an opportunity for the full consideration of all relevant issues and claims.

Appellant's assertion that he has undergone a reduction in grade does not constitute an adverse action which is appealable to the Board, as he had voluntarily accepted the lower-graded position which was offered by the agency in lieu of separation. The presiding official correctly concluded that as the action was not a reduction-in-force nor an adverse action, the Board was without jurisdiction to adjudicate the appeal. Thus the dismissal was proper.

Accordingly, upon review, he hereby AFFIRM the initial decision of the presiding official.

This is the final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeals are filed within thirty (30) days of receipt of the decision by appellants.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Edward Chow
v.
Social Security Administration

Docket No.
NY075299037

Opinion and Order

Appellant, Edward Chow, was discharged by the Social Security Administration for converting, for his personal use, three money orders which were the property of the agency. Appellant was indicted and pled guilty to the offense of embezzlement. At the hearing held by the Board's New York Field Office, the appellant acknowledged his guilt, but argued that at the time of the action charged he was a compulsive gambler, and that his action resulted from his problem. He stated he had been undergoing treatment, and had since performed his job without incident. The presiding official, however, concluded that the charges had been proved by the agency and sustained the removal. Subsequently, a petition for review of the decision was filed.

In the petition for review, appellant contended that he is a chronic gambler and that he should not have been removed without prior effort at rehabilitation, such as is required in the case of employees addicted to alcohol and drugs.

Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, and Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972, set forth requirements applicable to the Federal Government as employer in the case of employees who suffer from alcoholism or abuse drugs. They apply strictly to employees suffering from those problems and neither the laws nor their legislative histories evidence any intent by Congress that their terms be extended to employees who may be "addicted" to gambling. See 1970 U.S. Code Cong. and Ad. News, 5720 *et seq*. Accordingly, the presiding official did not err in refusing to place the same burden of rehabilitation on the agency in the case of an employee with a gambling problem as the law does in the case of an employee who abuses drugs or alcohol.

Further, the claim that appellant suffers from a disease because of his gambling fails to establish that appellant is a handicapped individual as defined by statute and regulations. See 29 U.S.C. 701

et seq. (1978) and 29 C.F.R. 1613.702. In *Southeastern Community College v. Davis*, 442 U.S. 397 at 406 (1979), the Court said that an otherwise qualified handicapped person "is one who is able to meet all of a program's requirements in spite of his handicap." Moreover, even assuming *arguendo* that appellant was a "qualified" handicapped person, reasonable accommodation would not require the agency to ignore his theft of money orders.

Accordingly, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board on this case.

The appellant is hereby notified of his right to file a civil action in an appropriate circuit of the United States Court of Appeals or the Court of Claims within 30 days of receipt of this Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ERNEST CLARK, JR.
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
SF075209142

OPINION AND ORDER

The appellant was notified of the decision to remove him effective December 28, 1979. In an appeal reviewed by the San Francisco Field Office on January 17, 1980, he asserted several defenses to the charges and raised the affirmative defenses of racial discrimination and "whistleblowing."

According to 5 U.S.C. 7702 and 5 C.F.R. 1201.154, in any matter in which an employee alleges to the agency that the basis for the action was prohibited discrimination, the agency shall have 120 days to resolve the matter. If the agency has not resolved the matter or issued a final decision within the 120-day period, the appellant shall file an appeal to the Board within a year after filing the formal complaint with the agency.

The presiding official's decision noted that on July 24, 1979, the appellant filed a formal complaint to the Office of Personnel Programs Integrity (PSI) in which he alleged that his removal was in reprisal for his having filed a previous Equal Employment Opportunity (EEO) complaint. In the December 13, 1979, letter of removal, the presiding official stated that the charge of reprisal had been mooted. However, the Director of the PSI office disagreed that the issue was moot, and according to the initial decision, he notified the appellant in a letter dated January 8, 1980, that the appellant's July 24 complaint had been accepted by the PSI office for investigation. The presiding official apparently used the date of the acceptance of the July 24 complaint as the date of filing and dismissed the case for lack of jurisdiction.

The petition for review asserted that the presiding official was erroneous in his interpretation regarding the time of filing and contended that because more than 120 days had elapsed since the time of filing the complaint within the agency, the Board should reverse the decision of the presiding official and adjudicate the matter.

Because of the numerous and voluminous charges, counter-charges, and peripheral motions over an extended period of time in this case, the chronology of the significant events is not entirely clear. However, even though the PSI office may now be investigating this matter, more than 120 days has passed since the date of filing the complaint within the agency.

Accordingly, the initial decision dated March 20, 1980, is hereby REVERSED and the case is hereby REMANDED to the presiding official for adjudication of the appeal.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES H. COLE
v.
DEPARTMENT OF THE TREASURY

Docket No.
PH075299052

OPINION AND ORDER

The appellant was removed from a position with the Internal Revenue Service, Erie, Pennsylvania. He appealed to the Board's Philadelphia Field Office. In the initial decision, the presiding official found that the appeal was prematurely filed because appellant had filed a discrimination complaint within the agency on the appealable matter, the agency had not issued a decision on the complaint, and 120 days from the date of the complaint had not elapsed. Accordingly, the appeal was dismissed without prejudice.

The initial decision dated August 7, 1979, specified that it would "become a final decision . . . on September 11, 1979, unless a petition for review is filed with the Board. . . ." Appellant's petition for review is dated April 17, 1980.

The time limit for filing a petition for review is not absolute, however, because the Board's regulations provide at 5 C.F.R. 1201.113 for extensions of time "for good cause shown." Under 5 C.F.R. 1201.22(b), the date of filing shall be deemed the date of mailing to the Board or receipt by the Board upon personal delivery.

In the instant appeal, the Board granted appellant 20 days from May 13, 1980, to submit any written argument that there was good cause for the untimely filing of his petition for review. The Board, however, has not received a response.

The Board finds that good cause to extend the filing time limit has not been established. Accordingly, the petition for review is DENIED as untimely filed.

This is the final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of the Order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BILLY E. ELKINS
v.
U.S. DEPARTMENT OF JUSTICE

Docket No.
DA075209087

OPINION AND ORDER

Appellant was removed from his position as Correctional Treatment Specialist at the agency's Federal Correctional Institute at El Reno, Oklahoma effective October 6, 1979. He appealed to the Board's Dallas Field Office. In an initial decision dated February 5, 1980, the presiding official found that although the only sustainable specification against appellant was violation of the agency's regulations concerning "traffic in contraband," that single sustained charge was sufficient to warrant removal of appellant. Appellant petitioned for review alleging, among other things, that the initial decision erroneously interpreted the agency's regulations concerning contraband, 28 C.F.R. 6.1, and P.S. 3735.

Having considered the petition and the agency's response thereto we conclude that a significant question of interpretation of regulations has been raised, and accordingly the petition is GRANTED.

As discussed in detail in the initial decision, both the unsustained specification of "acceptance of a gift from a prisoner" and the contraband specification relate solely to the receipt by appellant of a painting by an inmate artist. It was given to appellant by a ground of inmates in appreciation for his work in counseling inmates at the institution.

The Board recognizes the legitimate security concerns necessitating a broadly applicable regulation prohibiting unauthorized materials from moving into or out of federal prisons. Nonetheless, the Board finds that the presiding official erroneously interpreted the agency's contraband regulations in this particular case. Contraband is defined in section 8 of the agency Standards of Conduct, P.S. 3735, as "any article which is unauthorized under the circumstances." [1]

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[1] The cited section of the Standards of Conduct is intended to provide guidance in the application of the contraband prohibition of 28 C.F.R. 6.1 which in turn, implements 18 U.S.C. 1791. It specifies certain obvious prohibited items such as alcoholic beverages and drugs, but reserves the question of the contraband nature of other items for determination on a case by case basis.

Since the presiding official found that the custom and practice at this particular prison did not prohibit the acceptance of the painting from inmates in the circumstances of appellant's case we must conclude that the presiding official erroneously determined that the painting in question was contraband within the meaning of the regulation. The presiding official clearly found that "under the circumstances" it was proper for appellant to accept the painting. Having so found, it cannot be said that the painting was "unauthorized under the circumstances." Therefore appellant's subsequent removal of the painting from the institution did not and could not constitute "trafficking in contraband". Accordingly, the Board finds that none of the specifications against appellant can be sustained.

The initial decision and the agency action are hereby REVERSED and the agency is ordered to CANCEL the removal.

This is the final order of the Merit Systems Protection Board in this appeal. The agency shall furnish evidence of compliance with this order to the field office within ten (10) days of the date of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES L. FELTUS
v.
DEPARTMENT OF ENERGY

Docket No.
AT035109011

OPINION AND ORDER

The appellant's position as Program Manager, GS-14, with the Department of Energy, Region IV, Atlanta, Georgia, was abolished as a result of a reorganization in the Office of Regional Representative. The effective date of the action was August 26, 1979. As a consequence of this reduction in force (RIF), the appellant was changed to the lower-graded position of Senior Energy Conservation Specialist (Team Leader), GS-13, (retained grade until June 16, 1981). The appellant filed an appeal with the Board's Atlanta Field Office alleging: (1) that the reorganization which led to the RIF was never approved by agency headquarters; (2) that the RIF was actually a guise to effect the appellant's change to a lower grade; (3) that the RIF notices did not comply with the regulations; and (4) that the RIF was retaliation for appealing a previous RIF action. The presiding official reviewed the pertinent evidence and found no violation of the appellant's rights under the applicable reduction-in-force regulations. Therefore, he affirmed the agency's action.

In his petition for review, the appellant has contended: (1) that he was denied the right to a hearing on two previous appeals to the Board on proposed RIF actions; (2) that his rights were adversely affected because of the failure of management to prepare functional statements as part of the reorganization; and (3) that the presiding official erred in his refusal to admit evidence about an earlier reorganization plan which appellant claimed would show favoritism on the part of the agency.

Regarding the first contention, the appellant was issued a RIF notice on June 1, 1979. He appealed this action to the Board on July 2, 1979. On July 11, 1979, the agency notified the appellant that it was cancelling the action. Consequently, the Atlanta Field Office issued a decision dismissing the action for want of appellate jurisdiction. The appellant has claimed that he was entitled to a hearing on this appeal and on a second appeal, filed August 9, 1979, which was dismissed as premature. As part of this contention, he also alleged that he was entitled to attorney's fees under 5 C.F.R. 1201.37.

5 C.F.R. 1201.24 (c) does grant an employee a right to a hearing, but this right is contingent on the Board having appellate jurisdiction over the matter presented. Section 1201.3 sets forth the matters included within the Board's appellate jurisdiction. A reduction in grade of a competitive employee such as the appellant is included within the Board's jurisdiction, but the petition for appeal in such a case may not be filed until after the effective date of the action being appealed. (5 C.F.R. 1201.22).

The Board finds that the first appeal was properly dismissed as there was no action effected which could be adjudicated by the field office. The second appeal was also properly dismissed because the action had not been effected at the time the appeal was submitted. Under these circumstances, the appellant had no entitlement to a hearing since there was no action which was subject to adjudication by the Board. Subsequently, when the action was effected, the field office accepted the appeal and provided the appellant a hearing. Therefore, the Board finds no violation of law and regulation on the part of the field office.

Considering the contention regarding the function statement for each organizational element, appellant has averred that the lack of such statements is in violation of the requirements imposed by agency headquarters. A memorandum presented by appellant, dated March 15, 1979, stated:

> The Deputy Secretary has approved the attached Regional Office Organization Plans. The approval of these organizational structures should not be construed as approval of ingrade levels . . . Such determinations will be made by the appropriate Personnel Office within the context of the structure, the functional statement for each organizational element . . .

Through the testimony of the officer charged with classifying the new positions, appellant established that there were no written function statements. However, further examination of this referenced testimony reveals that the classifier was given the basic responsibilities and purpose of the program so that he could proceed to formulate position descriptions. In fact, the reorganization basically involved the redistribution of functions, presently being performed by the agency. Therefore, even though the managers had not devised formal function statements, the basic responsibilities of the organization were known, and there was no established effect on the RIF due to the lack of written function statements.

In the third contention, the appellant has challenged the presiding official's refusal to admit evidence concerning an earlier reorganization which he asserted would show favoritism on the part of the agency. According to the record, the presiding official refused to admit this evidence because the proposed plan was established two years prior to the reduction-in-force action effected in the appellant's case. The record clearly shows that the proposed plan was never implemented and that the primary personality involved in its inception had no input into the current reorganization plan. The appellant has failed to show the relevance of this information to the current reduction-in-force action. Therefore, it does not present an issue for review.

Finally, appellant has requested that the agency be made to pay attorney fees for the appeals filed on July 2, 1979, August 9, 1979 and August 29, 1979. In *Allen v. United States Postal Service*, 2 MSPB 582, 586 (1980) the Board discussed the statutory requirements for awarding attorney fees, and determined them to be:

1. The appellant must be the "prevailing party."
2. The award of attorney fees must be "warranted in the interest of justice", and
3. The fees awarded must be "reasonable."

If either of the first two requirements is not met, the motion may be denied without consideration of the other prerequisites. *Allen*, id.

Applying these prerequisites to the appeals of appellant, we note that the appeals, filed July 2 and August 9, were dismissed for lack of jurisdiction. Thus, appellant was not the prevailing party in these instances and could not be awarded attorney fees. In the final appeal, the Board's initial decision sustained the agency's action, and appellant filed a petition for review. Having considered all of appellant's contentions, the Board has found no basis for a review of the initial decision. Consequently, the initial decision stands, and appellant is again not the prevailng party. Therefore, his motion for attorney fees in this appeal cannot be granted.

The Board, having fully considered appellant's petition for review of the initial decision and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition

for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., ***November 25, 1980***

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROSALIE M. GILLIGAN
v.
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No.
DC075299095

OPINION AND ORDER

The appellant was suspended for 30 days and appealed the suspension to the Washington, D.C. Field Office. Following a two-day hearing, the presiding official concluded that the suspension was warranted and affirmed the agency action. The appellant, through her attorney, petitioned for the Board to review the initial decision, alleging that it is based upon erroneous interpretation of statute or regulation.

The appellant, a Realty Specialist, GS-1170-13, in the Western Examination Branch of the agency, was given a 30-day suspension because of disrespectful conduct and failure to carry out a proper order. A letter of reprimand and a 10-day suspension were cited in the notice as past disciplinary record.

In her petition for review, filed on October 31, 1979, the appellant alleges that the initial decision is based upon an erroneous interpretation of statute or regulation in that:

1. the deciding official was furnished *ex parte* evidence by the appellant's supervisor and the proposing official;
2. the agency failed to prepare a summary and give proper consideration to appellant's response; and
3. the presiding official erred in ruling that the two instances of past disciplinary action "were not arbitrarily or capriciously accomplished."

Citing *Camero v. U.S.*, 375 F.2d 777 (Ct. Cl. 1967), *Ryder v. United States*, 585 F.2d 487 (Ct. Cl. 1978), and other cases, the appellant alleges that the agency violated the appellant's due process rights since the memoranda furnished to the deciding official were *ex parte* communications which were written with the intention of influencing the deciding official.

In his initial decision the presiding official rejected a number of allegations of procedural error raised by the appellant. As to the first, the appellant contended that written memoranda by the proposing official and the appellant's supervisor commenting on the appellant's written reply and sent to the deciding official were *ex parte* communications. The presiding official credited the testimony of the deciding official that she did not read the memoranda before making her decision, and that they were not considered in reaching the decision. Consequently, he found that the memoranda did not constitute *ex parte* evidence.

The presiding official also rejected the appellant's second argument, finding that the deciding official did not deem the April 20 discussion to be an "oral reply," and that she did consider the matters discussed, including sex discrimination and other possible affirmative defenses, but did not find the matters raised to be pertinent to the issues in the proposed suspension.

The presiding official concluded that the appellant had failed to demonstrate "harmful error" within the meaning of 5 C.F.R. 1201.56(c)(3).

With respect to the merits, the presiding official found that the charges were sustained by a preponderance of the evidence, that the past record was appropriately considered and that there was no evidence of sex discrimination or reprisal in the agency's action. Accordingly, he affirmed the agency action.

Camero and *Ryder*, *supra*, cited by the appellant in her petition, concerned the standard of fairness inherent in the concept of an adversary hearing. In *Fitzgerald v. U.S.*, Court of Claims No. 26-79 (May 28, 1980), the court rejected a plaintiff's attempt to broaden the application of *Camero* and *Ryder* to cover a memorandum which was part of the administrative record. The court stated:

> Initially, we note plaintiff's argument that Dr. Haynes' "*ex parte* memorandum" submitted to the Assistant Secretary for Administration, and thenceforth part of the administrative record, violated her due process rights under *Camero v. United States*, 179 Ct. Cl. 520, 375 F.2d 777 (1967), and *Ryder v. United States*, 218 Ct. —, 585 F.2d 482 (1978). Plaintiff attempts to extend *Camero* and *Ryder* too far. In *Camero*, the court found the discharge of an Army civilian employee unlawful because of *ex parte* communications by the Government's attorney to the base commanding officer who was reviewing the hearing officer's determination. Similarly, in *Ryder*, the plaintiff's supervisor who initiated an inefficiency removal communicated with the post commander while the commander was engaged in the review process. In both these cases, plaintiff's adversary communicated with an official charged with a quasi-judicial review role. In our case, however, Dr. Haynes' function was to analyze the medical evidence and present it to the Assistant Secretary for an ini-

> tial decision. Dr. Haynes' role was entirely consonant with the appropriate procedures and not the type of communication at issue in *Camero* and *Ryder*.

In the present case, even if we were to consider the memoranda to be improper communications (and we are not convinced that they were), nevertheless during the hearing the appellant's attorney argued the issue of the alleged impropriety of the memoranda before the presiding official. All relevant persons were present and were questioned by the appellant's attorney at the hearing on the appeal. Based upon the arguments and testimony presented, the presiding official made credibility findings and concluded that the deciding official had not considered the memoranda in reaching her decision.

The petition for review presents no new evidence. The Board finds no error in the presiding official's determination that the appellant was afforded fundamental due process and finds no basis for finding that the initial decision is based upon an erroneous interpretation of statute or regulation. *Gregory K. Vann v. Department of the Navy*, 1 MSPB 472 (1980).

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board.

The appellant has a right to petition the Equal Employment Opportunity Commission to consider the decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. Distrct Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. District Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT L. HEAD
v.
DEPARTMENT OF THE ARMY

Docket No.
SE035199004

OPINION AND ORDER

The appellant was separated from a position with the Department of the Army, Fort Richardson, Alaska, through reduction in force (RIF). He appealed to the Board's Seattle Field Office. A hearing was held on the matter on August 14, 1979. The presiding official issued his initial decision on September 19, 1979. In that decision he sustained the reduction-in-force action. In his petition for review, the appellant contended the presiding official erred in not calling certain witnesses requested by the appellant, in his interpretation of statute, regulation, and the negotiated agreement regarding the availability of a vacant position, and in failing to recognize that the appellant was discriminated against in the RIF. The agency response stated that it has no further argument on these issues to submit.

The appellant also alleged that the initial decision is erroneous because "evidence the appellant feels is essential to a judicious resolution was and is currently being decied (sic) by the Federal Labor Relations Authority pending their prosecution of related ULP's 9-CO-2 and 9-CA-12. . . ." From review of all of the appellant's references to previous requests for material, it appears that he desired various Inspector General and Management Reports, as well as time records of the union officials. We find no error, however, because appellant never requested the presiding official to order the agency to produce the documents pursuant to 5 C.F.R. 1201.81.

With regard to the alleged error in not calling witnesses, two requests of the appellant which were denied are specified: one, the failure to call Glenn Gibson as a witness and two, the failure to accept as an exhibit, a suggestion submitted by the appellant's supervisor in 1975. Mr. Gibson, an employee of Fort Wainwright, some 350 miles from Fort Richardson, was requested to provide testimony on the denial of training to a "Fort Wainwright employee who comes under same Directorate Supervisor as appellant because of his union activities," and the "intent of required training of employees during RIF on Fort Richardson." The presiding official declined to request the production of Mr. Gibson as a witness because of his lack of first-hand knowledge of the circumstances of the appellant's RIF and because other witnesses would be able to provide information on the training requirement. The appellant has identified no new information that Gibson's testimony could have added to the record. The record developed before the presiding official indicates that Gibson's testimony would have been of a corroborative nature. The Board finds no error in the presiding official's denial of Gibson as a witness at the hearing. With regard to the suggestion, the hearing transcript shows that the presiding official allowed some testimony regarding this suggestion and gave the appellant the opportunity to demonstrate its relevance to the RIF at issue. The appellant failed to demonstrate any connection between the suggestion and the RIF, and the presiding official declined to accept it into the record. The Board finds no error by the presiding official since the evidence was immaterial. 5 C.F.R. 1201.62.

The next error alleged in the petition is the presiding official's conclusion that the agency had no obligation to offer appellant a vacant position. This conclusion is supported by 5 C.F.R. 351.201(b), which states that in a RIF action an agency is not required to fill a vacant position.

The appellant contended that Article 20, section 7 of the Negotiated Agreement required the agency to train the appellant and offer him the vacant position. Section 7 provides:

> When advance knowledge of the impact of pending change in function, organization and mission is available, it shall be the responsibility of the parties to meet and plan for the retaining of the employees involved to provide for maximum workforce retention. All employees affected will be counseled as to what positions and opportunities are available. Counseling will be in accordance with applicable regulations. Those employees who need retraining to qualify for the best offer available at the same or lower grade will be provided such training.

The agreement contains no definition of the term "best offer available," but the appellant testified to his belief that it includes vacant positions for which the agency is recruiting. The appellant offers no authority upon which his belief is based. The regulations of the Office of Personnel Management provide a right of assignment only to encumbered positions. 5 C.F.R. 351.703 (1979). The appellant has presented no evidence that the negotiated agreement was intended to limit management discretion under the provisions of 5 C.F.R. 351.703 (1979) or 5 C.F.R. 351.201(b) (1979).

Accordingly, the Board finds no error in the findings of the presiding official on this issue.

Finally, the appellant has alleged that the presiding official erred in not recognizing that he was discriminated against in the RIF. The presiding official considered appellant's allegations regarding this matter in two contexts. He considered generally whether there was support for the appellant's contention that the agency manipulated the RIF to "get rid of him" and also specifically whether the RIF was conducted in reprisal for his activities as an EEO representative. The appellant alleged that the agency had been closely monitoring his time when he was serving as a union steward although they had stopped when he stopped serving in that capacity. The record reflects that the agency submitted evidence showing that the decision to abolish all of the Pipefitter positions had been made in 1977/1978 and that the agency had been waiting to see if the matter could be resolved through attrition.

The appellant also asserted that the agency offered him assignments that it knew he would not accept. He testified that Fort Wainwright is some 350 miles from Fort Richardson and that he could not accept a reassignment there because he has small children and could not uproot his family. He further asserted that the WG-10 position offered him would involve his taking a position with which he was unfamiliar and which could result in danger to himself and fellow employees and that it was a swing shift which he could not accept because it would disrupt his family life and/or would preclude his working as an employee representative. The record reflects that all of the affected employees were offered WG-10 assignments. It was established that the WG-10 position offered appellant would involve working for a foreman who thought highly of the appellant's ability. The foreman was also an employee who had been represented by the appellant in an EEO matter and was presumed to have good rapport with the appellant. The Board does not find that the agency could reasonably have foreseen that the appellant's concern for employee safety, or his concern that the foreman might have problems with allegations of favoritism if he accommodated the appellant's needs for shift changes to represent employees, would result in his declining the position offered. The Board also can find no evidence of bad faith in the agency's offering the appellant a reassignment opportunity, even one 350 miles away, when he was otherwise facing separation through reduction in force.

With regard to the alleged reprisal for EEO activities, the appellant offered as evidence only the fact that the reduction-in-force notices were received shortly after an incident in which he was "yelled at" for showing up at a meeting with an employee whom he was representing. The agency countered that the meeting was a management meeting at which the employee in question had been told it would not be appropriate to bring his personal EEO representative. Regardless, it was established that the positions in appellant's group had been abolished some years previous. No connection between the EEO incident and the issuance of the RIF notices was made. Accordingly, the Board finds no error in the presiding official's findings that the appellant's assertions in this regard were not supported.

The petition for review is denied. This is the final decision of the Merit Systems Protection Board in this case.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. district court. Either a petition to EEOC or a civil action in a U.S. district court must be filed no later than 30 days after the appellant's receipt of the final decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of a final Board decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Alfred C. Hernandez
v.
Office of Personnel Management

Docket No.
SF073199002

Opinion and Order

Appellant's applications for Mid-Level Positions were rated ineligible by the Office of Personnel Management (OPM) and appellant was so informed by letter dated June 13, 1979. That letter advised appellant of his right to appeal OPM's decision to the San Francisco Field Office of this Board if he filed such an appeal no later than twenty calendar days from the date of his receipt of the letter. OPM provided appellant with the proper address of the San Francisco Field Office.

By letter dated July 19, 1979, postmarked July 20, 1979, appellant filed an appeal with the Field Office. He stated that he had received the OPM decision letter on June 23, 1979. Noting the apparent untimeliness of the appeal, the Field Office provided appellant an opportunity to establish good cause for waiver of the twenty-day time limit set forth at 5 C.F.R. 1201.22(b). In response, appellant stated only that "due to reasons beyond our control and having to do with a critical economic situation resulting from a long period of unemployment, I was absent from my home address for a few days." In his initial decision, dated September 5, 1979, the presiding official determined that appellant had been properly advised of his appeal rights, including the time limit for filing an appeal, that the appeal was nonetheless untimely, and that appellant had failed to establish good cause for a waiver of the time limit.

The initial decision informed appellant that he had the right to file a petition for review with the Board, that he had thirty-five days from September 5, 1979 to file such a petition, and that the initial decision would become final on October 10, 1979 if a petition for review was not filed. The Board's postal receipts establish that appellant received the initial decision on September 7, 1979.

Appellant did file a petition for review, but his petition was dated October 24, 1979, fourteen days after the initial decision had become final, and the petition was not received by the Board until October 30, 1979. Appellant was again provided an opportunity to show good cause for waiving the time limit, and in response he stated:

> The interest of this case was closely and jealously followed by undersigned and irrespective of whether my notice for appeal arrived precisely on time or not, common sense attributable to all reasonable and prudent persons obviously indicates that a decision which can well represent the future and welfare of an individual and his family, be seriously jeopardized simply because the said appeal did not arrive on time . . . If throughout the entire case, Plaintiff exhibits a constant and diligent interest by replying to every communication and responding to every appointment and hearing and/or audience, it follows that only major circumstantial situations placed him in a position to be late in filing at the designated date . . . This case represents an entire future and ability to be gainfully employed to plaintiff, and its consequences, if ultimately adverse, will be of serious detriment and to the extent of seriously precluding him to achieve a decent living . . . The rigidity of administrative rulings applied without due and proper consideration to the extreme circumstances which caused Plaintiff to be late in filing his response, are in themselves subject to judicious interpretation and not necessarily governed by whimsical and capricious mandates.

The Board agrees with the sentiments expressed in appellant's response. For similar reasons, the Board has provided within its regulations a vehicle for waiving regulatory requirements, including those imposing time limits for action by the parties, in those cases where a party establishes a reasonable basis for his or her inability to comply with those requirements. 5 C.F.R. 1201.12. In the instant case, however, appellant has presented no explanation whatsoever for his failure to file the petition for review on time. Similarly, his explanation for his failure to file his appeal with the Field Office on time does not indicate why his absence "for a few days" prevented him from filing on time when considered in light of his admission that he had received OPM's decision on June 23, 1979.

The Board finds that appellant's petition for review was untimely filed, and that appellant has failed to show good cause for a waiver of the time limit for filing the petition. Accordingly, the petition for review is DENIED as untimely filed.[1]

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[1] This decision does not preclude appellant from filing a new application wit OPM for certification as eligible for appointment to a Mid-Level Position. I the event that he is again rated ineligible, he may exercise his right to appe that decision to the Board.

This is the final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LEON HOLBROOK
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DE035109006

OPINION AND ORDER

As a result of an overall review of its 124 Civilian Personnel Officer positions, the respondent agency determined that several, including appellant's, were overgraded. The agency applied reduction-in-force procedures in order to downgrade appellant's position from GS-13 to GS-12, effective October 14, 1979. Appellant received the grade and pay retention benefits provided by 5 U.S.C. section 5361 *et seq.*

He appealed, claiming that "numbers" only had been considered by the agency, as the action had been taken due to a decrease in the number of employees serviced by his office. He claimed that other factors should have been considered and that properly considered, the position warrants classification at the GS-13 level.

The presiding official affirmed the agency's action in his initial decision of December 28, 1979, and appellant petitioned for review on January 23, 1980. The petition reasserts the allegation that "numbers" had been the agency's sole consideration, and states that the presiding official erred in upholding "questionable management practices."

The agency's response of March 7, 1980 states that all factors required to be considered had been considered, and that documentation to that effect had been made a part of the record. The agency asserts that the petition should be dismissed for failure to meet the Board's criteria for review (*see* 5 C.F.R. 1201.115) and because appellant "has not questioned the correctness of his reduction-in-force action but has questioned the proper classification of the position in which he was placed." The agency states that appellant's exclusive remedy in that regard is a classification appeal to the Office of Personnel Management (OPM) under 5 U.S.C. section 5112.

We find the agency's position to be correct, and we deny the petition for review.

Appellant has received the full benefit of a reduction-in-force appeal. The presiding official reviewed the agency's procedures, and found that appellant had received a specific notice of reduction in force, and that he had not questioned the correctness of his listed competitive level, retention sub-group, srevice computation date, or competitive area. The presiding official found that the agency properly followed the reduction-in-force procedures in effecting the instant action and appellant has alleged no violation of reduction-in-force regulations in the petition for review.

At 5 C.F.R. section 351.201, OPM has provided, in accordance with the authority granted in 5 U.S.C. section 3502, as follows:

> (a) Each agency shall follow this part when it releases a competing employee from his/her competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, *reclassification due to change in duties*, or the exercise of reemployment right or restoration rights.
>
> (Emphasis supplied.)

Accordingly, an agency may only take a reduction-in-force action for one of the reasons cited, and to support its action, the agency must show by a preponderance of the evidence that it properly invoked the reduction-in-force regulations. *Losure v. I.C.C.*, 2 MSPB 361 (1980) at 365-366. The agency stated that the reason for the action was the decrease in the number of employees serviced by appellant's office. It has introduced evidence of the position review it accomplished, of its results, and of the analysis it did in determining that there has been a gradual change in duties warranting a downgrading action. Appellant, in his letter of November 21, 1979 to the presiding official, stated that "I have not and am not disputing the fact that a reduction in workforce has occurred." Thus we find that the agency had demonstrated a *bona fide* need to reclassify due to change of duties so that the reduction in force was taken for a proper reason. We find that the presiding official was correct to conclude that appellant's rights under the reduction-in-force regulations of 5 C.F.R. Part 351 were not violated.

Having so found, we decline to review the propriety of the reclassification itself so as to decide whether or not the position is now properly classified at the GS-12 level. The thrust of both appellant's petitions for appeal and for review has been to bring a classification appeal before the Board under the guise of a reduction-in-force appeal. However, the Board is without jurisdiction to adjudicate the reclassification of a position where there is retained grade and pay. 5 U.S.C. 5366(b). Appellant received grade and pay retention benefits. Therefore, his reclassification with retained grade and pay constitutes a personnel action not appealable to the Board. We have already found that appellant ha received the benefit of a reduction-in-force appeal such as is pr served by 5 U.S.C. 5366(a)(2)(B).

Accordingly, the petition is denied.[1]

This is the final decision of the Merit Systems Protection Boar Appellant is hereby notified of his right to appeal this decisi to the United States Court of Claims, or to the appropriate circu of the United States Court of Appeals, provided, however, th such appeal is filed within thirty (30) days of appellant's recei of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

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[1] Subsequent to the preparation of this Opinion, the Board was infor notified by the agency that appellant had died. In light of our dispositi the case, we find that it is not necessary to wait for a substitution of pa 5 C.F.R. 1201.35.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ABRAHAM KAUFFMAN
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
PH08318010027

OPINION AND ORDER

Appellant filed a timely petition for appeal from the reconsideration decision of the Office of Personnel Management (OPM) denying his request to elect a post-retirement survivor annuity. OPM alleges that appellant did not elect a reduced retirement annuity with survivor benefits for his spouse "in a signed writing received in the Office within 1 year" after he married on January 12, 1979. 5 U.S.C. 8339(k)(2). OPM states that it has no authority to waive the one-year filing limitation and thus his election was untimely and must be denied. Appellant argues that his election of a survivor annuity should be considered as having been received within the one-year time period.

Appellant testified at the hearing that he submitted the proper forms with a cover letter on March 7, 1979. He further testified that he called OPM in October and in December and both times was assured by office personnel that the forms had been received. Appellant testified to other financial arrangements he made with his present wife at the time of their marriage. He introduced into evidence a copy of their antenuptial agreement signed January 3, 1979, whereby appellant and his present wife agreed to renounce any claims to the property of the other, and appellant agreed to irrevocably name his present wife as the beneficiary of his life insurance policies and to assign her his survivor's annuity. Appellant changed his health benefits and his life insurance with Federal Employees Group Life Insurance, both of which are under programs administered by OPM.

Appellant's wife testified that she observed appellant prepare and send the necessary documents concerning election of survivor benefits; that appellant phoned OPM twice at her request to assure that the documents had been received; and that being the beneficiary of appellant's survivor annuity was important to her. Appellant argues that, in view of his timely submission of the proper forms, assurances by OPM that the documents had been received, and the timely and careful manner in which he carried

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out the other terms of the antenuptial agreement, his election of a survivor annuity should be considered as having been received.

OPM did not participate in the hearing. In an effort to show that the proper form was not received, OPM submitted two forms that informed appellant that a search of the records indicated that his election had not been received.

The presiding official found that appellant did in fact submit the proper form in a timely fashion and that OPM had received the document. He proceeded to reverse OPM's determination on the matter, finding that the preponderance of the evidence supported a finding that the election was timely made.

Between the date of the hearing and the date of issuance of the field office's initial decision, appellant submitted a letter to the presiding official containing case law supporting arguments he had made at the hearing. We must assume the presiding official considered the arguments since he specifically cited, and apparently relied on, some of appellant's cases in his initial decision.

OPM filed a petition for review arguing that it was given no opportunity to respond to appellant's submission before the presiding official issued his initial decision, and that this is an erroneous interpretation of statute and/or regulation. OPM also contends that it did not receive a copy of a document offered into evidence at the hearing. It challenges the genuineness of the document complaining that it was not properly identified. To the extent that the presiding official may have erred in not allowing OPM sufficient time to respond to appellant's submission, OPM has not shown it has been prejudiced. Nonetheless, in order to cure any error that may have occurred, we hereby GRANT the agency's petition for review and consider OPM's response at this time.

OPM essentially reargues that appellant did not timely file the necessary forms to elect survivor benefits. It reiterates its previously made contentions and attempts to rebut testimony offered by appellant at the hearing. We conclude that the presiding official's determination that appellant in fact mailed the necessary form is supported by the evidence of record.

We next consider OPM's argument that it did not receive a copy of appellant's Designation of Beneficiary for Life Insurance, offered into evidence at the hearing, and OPM's complaint that identification of the document was incomplete. There is no rule or regulation requiring that a copy of a document offered into evidence at a hearing be sent to the opposing party. Furthermore, any opposition to a document being offered into evidence must be made at the time it is offered. OPM, by not appearing at the hearing, waived any right to object and cannot be heard to complain at this time.

Accordingly, upon review, the initial decision of July 23, 1980, is AFFIRMED.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the field office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT MUNROE v. OFFICE OF PERSONNEL MANAGEMENT	Docket No. RB083190143

OPINION AND ORDER

The Petition of December 29, 1978, to the Merit Systems Protection Board to reopen and reconsider this case is DENIED.

In reviewing requests to reopen cases of this type, the Board is required to apply the review standards previously established by the Civil Service Commission under Section 772.312 of Title 5, Code of Federal Regulations. The information submitted does not establish that any of the regulatory criteria set forth in the regulations has been met.

The December 21, 1978 appellate decision of the Appeals Review Board set forth a complete discussion of the issues and the applicable law relevant to this case. As noted by the Appeals Review Board, there is no authority under the governing statute and regulations to allow retirement credit for the period from September 1, 1955, through June 30, 1959, in the absence of evidence that the appellant was employed during this period in a position which was covered by the Civil Service Retirement Fund.

The appellant's petition presents matters which are neither new and material, nor do they tend to show error in the decision of the Appeals Review Board.

The request to reopen this case, therefore, is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal, and exhausts the appellant's administrative appeal rights in this case. Any further remedy available lies within the federal court system.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JANICE W. NESSON
v.
DEPARTMENT OF THE TREASURY

Docket No.
PH043009006

OPINION AND ORDER

The appellant was removed for unacceptable performance of a critical element of her position pursuant to 5 U.S.C. 4303. That action was reversed on appeal to the Philadelphia Field Office. The agency petitioned for review. In view of our findings, below, the petition is GRANTED.

In his initial decision, the presiding official concluded that the agency was not required to establish a performance appraisal system under 5 U.S.C. 4302 prior to taking action against an employee based on unacceptable performance under 5 U.S.C. 4303. For reasons expressed in the Board's decision in *Wells v. Harris*, 1 MSPB 199 (1979), we find that this conclusion was erroneous.

The reversal of the action was based upon a finding that, although the agency had met its burden of proving "by substantial evidence" that appellant was performing unacceptably, it had failed to apply the principle of like penalties for like offenses. The Board's review of "exhibit 4", relied on heavily by the presiding official, reveals that the appellant's production rate was consistently below that of her coworkers. Indeed, the presiding official found that ". . . appellant had the lowest production of all the GS-6's in the unit, averaged over her weeks of activity." Initial decision at 8. His finding of unequal treatment rested on comparisons between the appellant and two other employees. The first employee worked on the program only one week and achieved a production rate which, although unsatisfactory, was still higher than the appellant had achieved in any but two weeks. The second employee was promoted to GS-5 at a time when her production rate was 6 cases below satisfactory, but it was also 6 cases above the rate of the appellant.

These two isolated examples do not persuade the Board that the agency failed to impose like penalties for like offenses. In the absence of evidence that the agency has retained employees with production rates consistently as low as the appellant's, the record will not support a finding that this principle was violated by the agency.

The initial decision is hereby REVERSED. In view of the Board's holding in *Wells*, the case is REMANDED to the Philadelphia Field Office for reconsideration consistent with that decision.

The presiding official shall provide copies of the Board's decision in *Wells* to all parties. The agency shall be afforded twenty (20) days in which to request reconsideration of the case under the standards of 5 U.S.C. Chapter 75. If the agency so requests, the presiding official shall provide the parties a reasonable time in which to present any supplemental documentary or testimonial evidence concerning the issue of whether, by a preponderance of the evidence, the action was taken for "such cause as will promote the efficiency of the service."

The presiding official shall then issue a new adjudication under the standards of Chapter 75 upon the existing record as supplemented. If the agency does not elect to request reconsideration under the standards of Chapter 75, the agency action shall be reversed as not authorized by 5 U.S.C. 4303.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GAEL E. PIERCE
v.
DEPARTMENT OF DEFENSE

Docket No.
SF075209225

OPINION AND ORDER

The appellant, Dr. Gael E. Pierce, appealed an action taken against him by the United States Department of Defense, Office of Dependent Schools, to demote him from the position of School Psychologist, Class IV, to that of School Psychologist, Class III. The San Francisco Field Office upheld the action of the agency and appellant then filed a petition for review with the Board, contending that the initial decision is contrary to law and other decisions issued by the Board.

The petition for review is hereby GRANTED.

The other cases involved appeals to our Washington, D.C. Field Office from persons employed as Guidance Counselors in Europe who were notified that their positions were being downgraded by the Department of Defense under the reclassification program involved in the instant case, which was published in Dependents Schools Regulations (DSR) 5511.9, Position Classification, dated July 1977. In those cases, the Board has upheld a reversal of the agency action and has ordered that the agency cancel its actions effecting changes to lower grades. *Charles P. Lomartere, et al. v. Department of Defense,* 4 MSPB 123 (1980). The agency's actions were reversed, although the Secretary of Defense has statutory authority to classify "teaching positions" as that term is defined in the law (20 U.S.C. 901(1) and 902(a)), because the agency had not shown that it complied with the terms of the law. In so holding, the presiding officials and the Board found that the agency failed to give reasons for its determinations that the General Schedule classification standard for GS-9 Teacher positions was the appropriate basis for comparison to the DODDS position of Guidance Counselor.

By virtue of appellant's status as a preference eligible in the excepted service with more than one year of current continuous service, and because he did not receive grade retention under 5 U.S.C. 5361 et seq., his reduction in grade is an appealable adverse action. *See* 5 U.S.C. 7511(a)(1)(B), 5 U.S.C. 7512(3), 5 U.S.C. 7701, and 5 U.S.C. 7513. However, with respect to the classification determination which led to the reduction in grade, the Secretary of Defense has broad discretion to create any system of classification for "teaching positions," and the determinations made under the system are not, *per se*, appealable to the Board. 20 U.S.C. 902 provides, in pertinent part:

> (a) . . . the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—
>
> > (1) the establishment of teaching positions;
> >
> > (2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population;

The agency did not assert that it attempted to make a direct comparison of "similar positions . . . in urban school jurisdictions in the United States. . . ." It stated, instead, that it relied on Office of Personnel Management (OPM) standards in classifying appellant's position. This is what occurred in the other cases, but we find the instant case to be clearly distinguishable because here the agency produced evidence to show that it compared the duties and responsibilities of appellant's position to the OPM standard for Psychologist positions. Considering the broad discretion granted to the Secretary of Defense under the law and the fact that OPM standards are applied to classify comparable positions in urban school jurisdictions in the United States of 100,000 or more population, the Board concludes that the presiding official properly found that the agency proved that it complied with 20 U.S.C. 902. Having so found, as we held in *Lomartere, supra*, 124, the Board lacks authority to go behind the action to determine whether the position is now placed in its proper grade and class. The presiding official, therefore, erred in making a finding that appellant's position was now properly classified, as that was beyond the scope of his authority under the law. We find, however, that his decision is otherwise correct.

Accordingly, as modified by the above, the initial decision is hereby affirmed.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EDMUND T. SAMPLE
v.
DEPARTMENT OF THE NAVY

Docket No.
PH075299080

OPINION AND ORDER

Appellant was discharged on May 25, 1979 due to unauthorized absences totaling 1,123 hours during the period February 23, 1978 to April 3, 1979. The appellant's defense to the charge was that he was legitimately absent due to non-job-related injuries. The agency did not dispute this, but contended that the termination was proper under the circumstances. The presiding official sustained the agency action.

In the petition for review filed by appellant's attorney, it is argued that the agency should have allowed appellant to continue in a leave without pay status (LWOP) after he had exhausted his accrued leave. It is also argued that the agency failed to prove appellant's discharge would promote the efficiency of the service, as required by 5 U.S.C. 7513.

The agency did not dispute, and in the initial decision it was found, that appellant's absences were due to legitimate injuries. Prior to February 23, 1978, the agency had granted appellant 160 hours of LWOP; however he was informed on that date that no further LWOP would be granted, and that any further absences without leave would be considered unauthorized.

The appellant does not dispute the number of absences but argues that the decision not to allow further LWOP was improper. There is no regulation or statute cited in the petition which supports this argument, and therefore it does not meet the criteria for review of initial decisions by the Board. 5 C.F.R. 1201.115(b).[1]

Appellant's contention that the agency failed to establish by a preponderance of the evidence that appellant's removal would promote the efficiency of the service is not supported by the record. The nexus between appellant's extended unauthorized absences and the disruption of the agency's business was delineated in testimony at the hearing and recounted in the initial decision. We find no error warranting reopening of the presiding official's decision in this regard. See *McKenzie v. U.S. Postal Service*, 1 MSPB 480 (1980).

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[1] The initial decision adequately discusses the discretion allowed an agency when deciding whether to allow LWOP.

Accordingly, the petition for review is denied.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WALLACE THOMAS
v.
DEPARTMENT OF THE ARMY

Docket No.
CH075209203

OPINION AND ORDER

Appellant timely filed a petition for appeal with the Board's Chicago Field Office from the action of the Department of the Army reducing him in grade as Medical Technologist, GS-7, to Medical Technician, GS-6, effective March 31, 1980. The reduction in grade was based upon the ground that appellant failed to possess the minimum educational requirements of a Medical Technologist under standards established by the Office of Personnel Management (OPM). Appellant had been erroneously assigned to his Medical Technologist position by the agency. Upon discovering that it had misassigned appellant, the agency requested a waiver of the educational requirements of the position from OPM. The request was denied and this adverse action was initiated.

Appellant asserted in his petition that the educational requirements for his position should be waived in view of his experience as a Medical Technologist. He also asserted that the agency's action was based on prohibited racial discrimination.

After affording appellant a hearing, the presiding official found, in his initial decision, that the agency established and appellant conceded that he did not meet any of the educational requirements established by OPM for the position of Medical Technologist. Therefore, the presiding official sustained the agency's charge as supported by the preponderance of the evidence. The presiding official further found that appellant did not receive disparate treatment from that accorded other employees and that he did not establish a prima facie case of discrimination. The presiding official concluded that the record established valid work-related reasons for taking its action against appellant and that his demotion was for such cause as will promote the efficiency of the service.

Appellant, by his counsel, timely filed a petition for review. The petition does not challenge the findings of fact and conclusions of the presiding official or allege that his decision is based on an erroneous interpretation of statute or regulation. Rather, it asserts that new and material evidence is available that, despite due diligence, was not available when the record was closed.

5 C.F.R. § 1201.115(a). Appellant contends that proposed regulations of the Department of Health and Human Services published in 45 Fed. Reg. 41794 (1980) simplify the requirements which hospitals must meet to be certified for participation in Medicare and Medicaid and place more emphasis on training and experience when reviewing the qualifications of health personnel. Appellant asserts that in view of this proposed evidence indicating a trend away from the strict application of educational requirements for medical technologists generally, his reduction in grade for failure to meet the educational requirements for his position as Medical Technologist was in error. The agency's response asserts that the proffered evidence has no bearing on the qualification standards prescribed by OPM for appellant's position.

Although appellant's proposed evidence is "new" as it was unavailable when the record was closed, 5 C.F.R. § 1201.115(a), it is immaterial to the undisputed charge that he did not meet the educational requirements set by OPM for the position of Medical Technologist. The proposed regulations may disclose a trend away from strict educational requirements for health personnel in the public sector, but they are not relevant to the qualification standards established by OPM for an employee in a position covered by 5 U.S.C. ch. 51.

Under 5 U.S.C. § 5112, appellant may request OPM to reascertain the qualification requirements for the position of Medical Technologist in light of his proffered evidence. His evidence is not, however, relevant to the charge sustained by the presiding official.

The Board, having fully considered appellant's petition for review of the initial decision issued on July 25, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

BARBARA A. ALLEN v. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT	Docket No. CH075209145

OPINION AND ORDER

Appellant's petition, wherein she appealed the agency's action in reducing her pay, was dismissed by the Board's Chicago Field Office as untimely filed. She has petitioned for Board review, and the agency has responded. The petition is GRANTED.

Appellant had been granted a within-grade salary increase on January 28, 1979. In a letter dated December 18, 1979, the agency notified appellant that the within-grade increase had been granted erroneously, and that her salary would be reduced retroactively to January 28, 1979. The letter referenced the Board's regulations governing appeals, and pointed out that "an appellant has 20 days in which to file an appeal." On February 27, 1980, appellant received two Form 50's (Notification of Personnel Action) relating to the pay adjustment, and on March 14, 1980, she filed her appeal to the Board.

The regulation referenced by the agency in its notification letter, 5 C.F.R. 1201.22(b), provides, in pertinent part, that the petitions

> must be filed anytime during the period beginning with the day *after the effective date* of the action being appealed until not later than 20 days *after the effective date.* (Emphasis supplied.)

The controversy in this case arises from attempts to identify the "effective date" of the pay reduction. We find that the record does not substantiate the presiding official's statement that the letter "clearly notified the appellant of the effective date of the 'pay adjustment'." Had it done so, our conclusion might have been different, but how and when the agency intended to go about correcting its "administrative error" were not specified in the December notice letter. In her petition, appellant stated that she filed within 20 days of receiving the first check which reflected the adjustment, which was coincident to her receipt of the SF 50 Forms. In response, the agency stated that,

> (s)ince the effective date of the action was retroactive to January 28, 1979, the December 18, 1979 letter constituted notice of decision on the action. The 20 days must run from the date of receipt of the letter.

The effective date of a reduction in pay is the date as of which an appellant begins to be paid at a lower rate. January 28, 1979, cannot be considered the effective date of the pay reduction for appeal purposes since appellant was not notified of any pay reduction—and in fact received an increase in pay—on that date. We find, therefore, that upon reading the regulation cited by the agency, appellant could reasonably have concluded that her appeal would be timely as filed, since until that time she continued to be paid at the higher rate.

Under the circumstances of this case, we conclude that the appeal was made in timely fashion. Accordingly, the initial decision is VACATED and the case is REMANDED to the Board's Chicago Field Office for further processing and adjudication.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENISE G. ANGELL
v.
DEPARTMENT OF THE NAVY

Docket No.
SE075209038

ORDER

Appellant was terminated effective September 25, 1979. She appealed to the Seattle Field Office contending that she had completed a probationary period and was therefore entitled to appeal to the Board under 5 U.S.C. 7511(a)(1)(A). However, the agency argued that no appeal was due the appellant. Both parties agree that the appellant received a temporary, limited appointment to the position of clerk-typist effective October 25, 1977, through October 25, 1978. On October 27, 1978 she received a career-conditional appointment to the position of clerk-typist which required the completion of a one-year probationary period. The agency argued that the appellant's service under the temporary, limited appointment did not meet the requirements of the Federal Personnel Manual (FPM), Chapter 315, Appendix A, and thus could not be credited toward the completion of a probationary period. The presiding official held that the appellant's prior service could not be counted because Appendix A, A-3c(1) did not specifically allow credit for a temporary, limited appointment and she dismissed the appeal for lack of jurisdiction.

The Office of Personnel Management (OPM) filed a petition for review pursuant to 5 U.S.C. 7701(e) and 5 C.F.R. 1201.114 in which it argued that Appendix A, section A-3c of the FPM, should be read to allow the crediting of all actual prior service as stated in that section. Because the appellant's service was rendered immediately preceding a career-conditional appointment without a break in service of more than 30 days, and was served continuously in the same line of work, OPM contended that her service met the requirements of Appendix A and that the presiding official had erred in her decision to dismiss the appellant's appeal.

The agency responded requesting that the Board reopen the presiding official's decision in order to correct the basis upon which that decision was made but that the Board uphold the actual decision to dismiss for lack of jurisdiction. The agency maintained that although prior service of a temporary, limited appointment could, under some circumstances be counted toward the completion of a probationary period, in this case the appellant had not met the specifications in Appendix A, A-3c(1) (a). That subsection requires that the prior service "was rendered immediately preceding career or career-conditional appointment or conversion. Employees must have been on the rolls of the agency at the time of the career or career-conditional appointment or conversion."

Because the appellant's temporary appointment terminated on October 25, 1978, and she was not appointed to the career-conditional appointment until October 27, 1978, the agency argued that she was not on the rolls of the agency at the time of the appointment and therefore her prior service could not be counted toward the completion of a probationary period.

According to 5 C.F.R. 315.803, the purpose of the probationary period is to determine as fully as possible the fitness of the employee. Section 315.802 requires that the probationary period be one year and mandates OPM to publish in the FPM the conditions under which prior service is counted toward completion of the probationary period.

The appellant here served almost two years when she was notified that she would be terminated. She fulfilled the criteria established by OPM which all go toward furthering the purpose of the regulation, which is that the agency have one year to determine an employee's fitness. To deny the appellant the right of appeal because of a break of one day in her service would defeat the intent of the regulations. *Cf. Marsh v. Preferred Accident Insurance Co.*, 89 F.2d 932 (6th Cir. 1937) (statutory construction). Thus, the appellant, having served a probationary period within the provisions of chapter 315 of the FPM, has a right to an appeal under 5 U.S.C. 7511(a) (1) (A).

Therefore, the initial decision of February 11, 1980, is hereby REOPENED, VACATED, and REMANDED to the field office for adjudication.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LINDA L. BANKS
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA075209014

OPINION AND ORDER

The appellant was charged with attempted theft of commissary property by deliberately failing to charge a customer for items purchased. She was removed from her position of sales store checker, Dyess Air Force Base, Texas, effective June 7, 1979. She appealed to the Dallas Field Office. The presiding official found that a preponderance of the evidence supported the agency's charge and found that the appellant failed to prove that her removal was based on racial discrimination. He affirmed the agency action.

The petition for review alleged that the decision of the presiding official was based on an erroneous interpretation of statute or regulation by the failure to provide the appellant with certain evidence, by the use of facts not in evidence and by wrongful interpretation of the facts. In its response, the agency stated that the presiding official was not in error and that there was no failure to provide evidence because the "best evidence" rule is not applicable to administrative proceedings.

The agency's evidence file includes photocopies of the transaction tape from the appellant's cash register and photocopies of the adding machine tape which was generated when the groceries were totaled after the alleged theft. The appellant protested that the originals of these tapes were not produced during the hearing.

5 C.F.R. 1201.65 provides that: "The presiding official may order any party to respond to requests for the admission of the genuineness of any relevant documents identified within the request . . ." The presiding official noted the appellant's objection but admitted copies of the documents in question into evidence after they were identified by a witness who was familiar with them. TR at 40-43.

This ruling was in accord with Rule 1003 of the Federal Rules of Evidence which provides that a duplicate (photocopy) is admissible to the same extent as an original unless there is a genuine question raised as to the authenticity of the original. The appellant has not questioned the admissibility of the original documents; rather she has demanded them. Moreover, 5 C.F.R. 1201.62 grants the presiding official authority to exclude evidence which is irrelevant, immaterial or unduly repetitious. Therefore, the Board finds the presiding official's acceptance of the documents at issue as proper.

The petition for review protests the fact that the agency did not prove the appellant's intent to commit the act or her guilt in regard to the charges against her. However, the presiding official reviewed all of the evidence and found that a preponderance of the evidence indicated that the appellant had in fact engaged in the conduct with which she was charged. The Board's regulations require that the agency action must be sustained if it is supported by a preponderance of the evidence. 5 C.F.R. 1201.56(a) (ii). We find no error regarding this finding.

Three harmful procedural errors were asserted by the appellant, two of which had been specifically discussed and rejected by the presiding official. The appellant has cited no law or regulation which has been erroneously interpreted by the presiding official and therefore has given us no reason to review these two claims. The third claim, that the letter of proposed removal lacked specificity, was submitted for the first time in the petition for review. In regard to this claim, the appellant has presented no new evidence which was not available when the record was closed which would justify consideration of this issue. Therefore, we will not review this claim of harmful error.

The appellant also contended that the presiding official relied on facts not in evidence when he determined that the evidence did not support the appellant's theory that groceries from another customer's shopping cart were included in the grocery recomputation made after the alleged conduct of the appellant had occurred. The presiding official had based his conclusion on this issue in part on the fact that the customer involved in the incident did not object to or question any of the items included in the recomputation of goods.

Although it is true that the customer in question did not testify at the hearing, and was not requested to testify, the file contains a statement given by that customer to a special agent on April 17, 1979, which supports the presiding official's conclusion. The customer's reaction was also described by another person who did testify. TR at 100. Hearsay is admissible in administrative hearings. *Wathen v. United States*, 527 F.2d 1191, 1199 (Ct. Cl. 1975), *cert. denied* 429 U.S. 8211 (1976). Therefore, we find no basis to review the presiding official's determination on this issue.

Finally, the appellant contended that a preponderance of the evidence is in the appellant's favor regarding testimony in the case pertaining to certain facts. She argued that three people (including the appellant) testified in the appellant's favor and two supported the agency's contentions. The decision of the presiding official on this point will not be reviewed. ". . . (W)hen questions of credibility are presented, due deference must necessarily be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses." *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

The appellant has failed to establish that new evidence is now available that was not available when the record was closed or that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. Therefore the appellant has not met the criteria for review under the Board's regulations at 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

The appellant has a right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. court of appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES E. BRADLEY
v.
CONSUMER PRODUCT SAFETY
COMMISSION

Docket No.
DC075209162

OPINION AND ORDER

Appellant was subject to an action reclassifying his position to a lower grade effective December 2, 1979. Appellant claims his reclassification was in fact an adverse action appealable to the Board and was related to an agency-wide reorganization occurring in May 1977. It is on this basis that he invokes the Board's jurisdiction.

We disagree with appellant's position and affirm the presiding official's opinion dismissing the appeal. It is clear that appellant accepted a new position after the May 1977 reorganization. However, appellant neither sought a classification review of his position in 1977 nor refused the benefits of serving in a position later found to have been overclassified.

We are, therefore, unpersuaded by appellant's contentions that he suffered anything other than a reclassification occurring in December 1979, and find no relationship between the reclassification and the agency reorganization on the facts of this appeal. Because appellant has enjoyed the protection of grade retention benefits under 5 U.S.C. § 5362 we find that the reclassification action of December 2, 1979, is not appealable to the Board under 5 U.S.C. § 7701.

The petition for review of the initial decision dated April 18, 1980, is hereby DENIED.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TOMMIE DAVIS v. U.S. POSTAL SERVICE	Docket No. DC075209068

OPINION AND ORDER

This appeal raises the question of the propriety of an attorney fees award under 5 U.S.C. 7701(g)(2) to counsel for appellant. After a hearing, the presiding official found in his initial decision that appellant's removal constituted a reprisal for having complained to the supervisor of his tour director of a racial slur made to appellant by his tour director. The removal action was reversed. The agency did not file a petition for review and the initial decision became final.

Counsel for appellant timely filed a motion for attorney fees pursuant to 5 C.F.R. 1201.37(a). The motion contained an itemized account from his time records totalling 45.9 hours spent on the case and requested reimbursement at the rate of $75 per hour for a fee award of $3,442.50. The motion also requested compensation for a technical advisor who attended the hearing at the rate of $50 per hour for 9 hours' attendance. The total award requested was $3,892.50. Appellant's counsel certified in the motion's certificate of service that he mailed a copy of the motion by regular mail to the agency's representative.

In his addendum decision dated May 6, 1980, the presiding official noted that the "motion was certified as served on the agency." Addendum decision at 1. The presiding official found that retaliatory discrimination on the part of the agency contributed to cause the removal action in violation of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, sections 704(a) and 717, 42 U.S.C. 2000e-3(a) and 2000e-16. He found further that 5 U.S.C. 2302(b)(1) makes it a prohibited personnel practice to discriminate against an employee in violation of section 717 of the Civil Rights Act of 1964 and that appellant, as a prevailing employee in a decision based on a finding of discrimination prohibited under section 2302(b)(1), should be awarded attorney fees pursuant to 5 U.S.C. 7701(g)(2) in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964, 42 U.S.C.

2000e-5(k). The presiding official stated, but failed to apply to the facts of the case, some of the factors considered by the courts in awarding attorney fees under section 706(k). He concluded that the hours spent on the appeal and the rate claimed by counsel were reasonable. The presiding official denied, however, the $450 award requested for the technical advisor because counsel's records did not reflect that she performed any services prior to the hearing and she did not participate in the hearing so that her legal services rendered, if any, were negligible. In view of his findings "and in the absence of opposition from the agency," the presiding official awarded counsel a total of $3,442.50 in attorney fees.

The agency timely filed a petition for review in which it alleged that it had been denied the opportunity to respond to the motion for attorney fees under 5 C.F.R. 1201.37(a)(2) because its designated representative did not receive the motion until he received the addendum decision of the presiding official to which a copy of the motion was attached. The agency asserted that its failure to receive a copy of the motion for attorney fees was its sole reason for not responding to the motion. The agency did not challenge the presiding official's finding of discrimination prohibited under 5 U.S.C. 2302(b)(1)(A). It asserted, however, that the presiding official erred in determining a reasonable attorney fee by not requiring appellant's counsel to submit adequate proof of the reasonableness of his fee request and in failing to set forth fully in his addendum decision the factors he considered in making the fee award. Counsel for appellant filed a response and an affidavit in which he stated that he mailed the agency's representative a copy of the motion for attorney fees as provided in the certificate of service to the motion. Counsel also submitted affidavits by his bookkeeper, other counsel, and himself, a memorandum and a copy of his time records as proof in support of the resonableness of his fee request and the fee awarded by the presiding official. He also requested an additional fee in the amount of $1,470 for preparing his response to the agency's petition for review.

The agency's petition for review is GRANTED.

The record of this case is devoid of any indication that the presiding official forwarded a copy of the motion for attorney fees to the agency by certified mail under 5 C.F.R. 1201.26(b). We infer from the addendum decision that the presiding official presumed by the certificate of service to the motion that delivery of the motion to the agency was effected by counsel for appellant by regular mail. Such voluntary service by a party, however, without acknowledgment of delivery by the receiving party to the presiding official, did not excuse the presiding official from effecting service of the pleading on the agency by certified mail under 5 C.F.R. 1201.26(b) to assure timely delivedy of the motion and to afford the agency the opportunity to file a responsive pleading within 10 days of receipt of the motion under 5 C.F.R. 1201.37 (a)(2).

We believe, therefore, that a remand to the Field Office is appropriate. The presiding official should reopen the record to afford the agency the opportunity to timely respond under 5 C.F.R. 1201.37 (a)(2) to the motion for attorney fees and all pleadings and exhibits subsequently filed by counsel in support of the fee award. Counsel for appellant should be permitted the opportunity to submit additional evidence and argument in support of a fee award and his request for an additional fee for defending the original fee award before this Board. The agency should be afforded the opportunity to timely respond to such additional submissions. The presiding official should issue a new addendum decision under 5 C.F.R. 1201.37 containing his findings of fact and specific reasons to support a determination of the reasonableness of the attorney fee award in accordance with the standards prescribed by section 706(k) of the Civil Rights Act of 1964.

Accordingly, the addendum decision of the presiding official is hereby VACATED and the case is REMANDED to the presiding official for further proceedings in accordance with this Opinion.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD D. EARLY
v.
CONSUMER PRODUCT SAFETY
COMMISSION

Docket No.
DC075209140

OPINION AND ORDER

Appellant was subject to an action reclassifying his position to a lower grade effective December 2, 1979. Appellant claims his reclassification was in fact an adverse action appealable to the Board and was related to an agency-wide reorganization occurring in May 1977. It is on this basis that he invokes the Board's jurisdiction.

We disagree with appellant's position and affirm the presiding official's opinion dismissing the appeal. It is clear that appellant accepted a new position after the May 1977 reorganization. However, appellant neither sought a classification review of his position in 1977 nor refused the benefits of serving in a position later found to have been overclassified.

We are, therefore, unpersuaded by appellant's contentions that he suffered anything other than a reclassification occurring in December 1979, and find no relationship between the reclassification and the agency reorganization on the facts of this appeal. Because appellant has enjoyed the protection of grade retention benefits under 5 U.S.C. § 5362 we find that the reclassification action of December 2, 1979, is not appealable to the Board under 5 U.S.C. § 7701.

The petition for review of the initial decision dated March 21, 1980, is hereby DENIED.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIE J. LEWIS v. DEPARTMENT OF THE ARMY	Docket No. DE035109007

OPINION AND ORDER

Appellant is a former GS-6 Inhalation Therapy Technician who was reduced in grade to GS-5 pursuant to a reduction in force (RIF). The agency effected the reduction in grade through RIF procedures because the cause of the reduction was a reclassification of appellant's grade due to a change in duties. *See* 5 C.F.R. 351.201. Appellant was kept at the GS-6 grade and pay level in accordance with the retained grade and pay provisions of 5 U.S.C. 5362.

The appellant in her appeal to the Board's Denver Field Office claimed alternatively that (1) her duties did not change and (2) new duties had been added to her position which strengthened her right to a GS-6 grade. The presiding official affirmed the agency decision.

Appellant in her Petition contends principally that (1) the changes in her job duties enhance her former GS-6 rating rather than form a basis for reducing it and (2) the agency reclassification was a sham. We hereby GRANT appellant's petition for review.

The presiding official stated that whether appellant's position is properly graded is not an issue the Board decides in a RIF appeal. She rested her decision primarily on her findings that (1) a change in appellant's duties had occurred and (2) the change "constituted a reorganization . . . [which] required the application of reduction-in-force procedures." *See* Initial Decision at 2-3.

The presiding official's statement that the Board does not consider grade classification in RIF appeals must be clarified. We do not determine whether a person's grade is correct as the Office of Personnel Management (OPM) does in a classification appeal proceeding. *See* 5 C.F.R. Part 511. We do examine grade level issues if necessary to determine whether a RIF is bona fide. *Cf. Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980).

The Board agrees with the presiding official's statement that she must determine whether a change in duties occurred, and we concur in her finding. The agency has described its action as a "reclassification due to a change in duties," and this kind of action is one listed in OPM regulations as a reason requiring the use of RIF procedures. *See* 5 C.F.R. 351.201. As a basis for challenging the bona fides of her RIF, appellant repeats a statement by one of her witnesses, Ms. Bonnie Boswell, that "Mr. Tom Kalter" had said "that . . . [her] job would be a GS-5 rating regardless of what the job description said." Ms. Boswell in the course of her testimony identified Mr. Kalter as the local chief of the agency's classification section. Appellant did not call Mr. Kalter as a witness. Without further testimony from Mr. Kalter, we do not have a sufficient basis for construing his statement to mean that the RIF was a sham or, assuming that the statement has such a meaning, for even determining whether he had sufficient knowledge of the RIF to voice a credible opinion about it.

As an additional basis for contending that her RIF was a sham, appellant relates that her supervisors testified that her new duties justified a GS-6 or higher. Appellant has not shown that her supervisors possess the expertise to be qualified to give an opinion on what her grade level should be. We have carefully reviewed the supervisors' testimony, and we find that rather than showing the RIF a sham, the testimony amounts to no more than statements of disagreement with the agency's classifiers.

The Board notes that this case is distinguishable from *Losure v. Interstate Commerce Commission, supra*, a case in which an appellant claimed that a RIF was not bona fide and the Board found for the appellant. In *Losure* the agency was not able to show any basis for the claim that a reorganization occurred. In the instant case, the agency has claimed that appellant was reduced in grade as a result of a reclassification action, and it has shown a basis for conducting such a reclassification, a change in appellant's job duties.

The appellant is not without a remedy, if her agency misclassified her job at the GS-5 level. She can file a classification appeal with OPM. *See* 5 C.F.R. Part 522; *Atwell v. Department of the Army*, 3 MSPB 8 (1980). If she files such an appeal, since she is receiving the benefits of the retained pay and grade provisions of 5 U.S.C. 5362, appellant will suffer no loss of pay or grade level during the pendency of the OPM adjudication.

We conclude therefore that the decision of the presiding official did not involve an erroneous interpretation of law or regulation and it is hereby ORDERED that this decision be AFFIRMED as modified herein.

This is a final decision of the Merit Systems Protection Board.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LARRY T. MILLER v. U.S. DEPARTMENT OF THE NAVY	Docket No. AT075209043

OPINION AND ORDER

The appellant *pro se* filed a petition for appeal with the Board's Atlanta Field Office on September 7, 1979, from his removal effective August 17, 1979, from the Charleston Naval Shipyard, Charleston, South Carolina, where he had been employed as a Mechanical Systems Test Inspector (Ships), WG-6201-13. The appellant's removal was based on the charge of "Excessive Unauthorized Absence" (first offense) for the period of April 30 through June 1, 1979, and on the charge of "Failure in Carrying Out Orders of Superiors" to report for work on May 23, 1979, (first instance) and to report for work on May 31, 1979 (second instance).

A hearing in the Field Office was held on November 13, 1979, at which the appellant was represented by legal counsel. The presiding official, by initial decision dated December 4, 1979, found that the appellant had presented evidence to establish that he "experienced anxiety, anguish, and depression over his personal life" due to his marital separation and other circumstances, but that his medical evidence did not show that he was "physically or mentally incapacitated" during his absence or that he was "incapable of acting rationally or responsibly." The presiding official found that the charge of excessive unauthorized absence was sustained by a preponderance of the evidence, as the objective medical evidence did not justify the extended absence.

The presiding official found, however, that the appellant furnished medical evidence to the agency's physician on May 22, 1979, in response to a memorandum from his supervisor on May 18, 1979, ordering him to report for work on May 23, 1979, or to furnish medical evidence in justification of his continued absence. The presiding official concluded that as it was not until May 25, 1979, two days after the designated reporting date, that the agency's physician informed the appellant that the medical evidence he had supplied was insufficient or unacceptable, the appellant reasonably believed that he had complied with the memorandum. Thus, the first instance of the second charge was found not sustained.

The presiding official found, as to the second instance, that the agency's charge of "Failure in Carrying Out Orders of Superiors" was sustained by a preponderance of the evidence. He held that the appellant had failed to attempt to supply any medical evidence to the agency for his absence on May 31, 1979, as he was directed to do on May 30.

Based on his findings that the first charge and the second instance of the second charge were sustained, the presiding official concluded that the appellant's removal was for such cause as would promote the efficiency of the service and sustained that action.

By petition for review timely filed with the Board by the appellant's counsel on January 7, 1980, the appellant alleged that the presiding official's finding that the agency had not sustained the charge of failure to carry out the supervisor's order to report for duty on May 23, 1979, "logically and legally required the presiding official to dismiss the other two charges as well." The petition also alleged that the presiding official failed to accord the appellant "treatment equal to that which the record showed had been accorded to another employee who had been reprimanded rather than separated." By a "MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW," filed January 10, 1980, the appellant asserted that the initial decision of the presiding official is erroneous because "it is internally inconsistent by correctly dismissing one charge, yet upholding other charges based on the same facts," because it allegedly "ignores clear and undisputed" evidence of the appellant's "severe emotional problems," and because the punishment imposed on the appellant is "vastly harsher" than that given to another employee in an allegedly similar case.

In its response filed on February 18, 1980, the agency asserted that the presiding official's finding that the May 23, 1979, instance of "Failure in Carrying Out Orders of Superiors" was not sustained did not nullify or cancel the second instance of May 31, 1979. The agency also posited that the presiding official properly found that the medical evidence furnished to the agency by the appellant did not establish that he was mentally or physically incapacitated for the period of his extended absence. His extended absence, hence, was properly found not justified and had no bearing on the May 23, 1979, instance which was found not sustained. The agency submitted that the appellant's removal was a proper punishment under its guidelines and that the appellant's contention that he was not accorded treatment equal to that accorded to another employee who had been reprimanded rather than removed was not viable, as the latter case was factually distinguishable from the appellant's case.

The petition for review of the initial decision of the presiding official is GRANTED.

The Board concurs with the agency that the finding of the presiding official that the agency did not sustain its charge against the appellant of "Failure in Carrying Out Orders of Superiors" in not reporting for work on May 23, 1979, as ordered, did not invalidate the charge concerning the second instance of May 31, 1979. The appellant's failure to attempt to supply any medical evidence to the agency in justification for his absence on May 31, as he had for his absence on May 23, renders the two instances of absences readily distinguishable. His assertion in this regard is based on his mistaken inference that the presiding official "in effect accepted" the medical evidence furnished on May 22 when he dismissed the first instance of charge two.

In fact, the presiding official found that the charge of excessive unauthorized absence was not excused by the medical evidence the appellant presented to the agency regarding his emotional problems. The record supports this finding. In February 1979, the appellant furnished the agency a note from his personal physician dated February 2, 1979, which requested that the appellant be permitted to remain on the day shift (as opposed to the "swing shift" with duty hours from approximately 4:00 P.M. until midnight) due to his nervous condition. The note did not contain a medical diagnosis of the appellant's condition and the agency's physician was subsequently advised by the appellant's physician that there were not any medical reasons why the appellant could not work whatever shift was available. On May 22, 1979, the appellant provided the agency's physician with a short letter from a psychiatrist dated May 21, 1979, which stated that consultation with the appellant indicated that he was frightened and confused over his personal life. It suggested that the appellant be permitted the opportunity to work day duty for three months while undergoing psychotherapy. The agency's physician, however, subsequently contacted the psychiatrist, who advised him that the May 21 letter was only a suggestion and not a psychiatric recommentation. In sum, the appellant's medical and psychiatric evidence presented in attempted justification of his absence did not support his assertion that he was mentally incapable of reporting for duty. The Board does not perceive any error on the part of the presiding official in finding that the appellant's excessive unauthorized absence was not excused by the medical evidence he presented.

We find no support in the record for any assertion by the appellant that the charge of "Excessive Unauthorized Absence" for the period of April 30, 1979, through June 4, 1979, cannot be sustained because the presiding official found that his absence on May 23, 1979, was excusable. The appellant contends that his absences up to May 25, when he was informed that his medical evidence was insufficient, must also be found excusable based on this finding. However, both the presiding official and this Board have found that the appellant's medical evidence was insufficient to justify his absence. The appellant was ordered by his supervisor on May 18, 1979, to report for work on May 23 or to present medical evidence in justification of his absence. The appellant's submission of the psychiatrist's letter to the agency on May 22 was found by the presiding official to excuse his failure in carrying out orders to report for work on the next day. However, his attempted compliance with his supervisor's order at that time did not authorize his absence from work for the period charged. Pursuant to the agency's "GUIDELINE SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR CIVILIAN EMPLOYEES IN THE NAVAL ESTABLISHMENT," which is a part of the record of this case, even the first offense of "EXCESSIVE UNAUTHORIZED ABSENCE (MORE THAN 5 CONSECUTIVE WORK DAYS)" may be penalized by removal. The preponderance of the evidence presented sustains the presiding official's finding that the appellant was absent without authorization for periods of far longer consecutive duration than the duration required by the schedule to make out an actionable offense.

Ultimately, the appellant alleges that he was not accorded treatment equivalent to that of another employee who was reprimanded, rather than removed, in an allegedly comparable case. The record reveals that in the case referred to by the appellant, the employee was charged with excessive unauthorized absence in failing to report for six work days. The employee's absence was found to be due to alcohol abuse which he was attempting to resolve by participating in an alcohol rehabilitation program. Hence, the agency only reprimanded the employee. In the instant case, however, the appellant was found absent without authorization or just excuse for every duty day, save one, from April 30, 1979, through June 4, 1979. Additionally, the presiding official found that the agency had sustained its burden of proof of the second instance of the second charge, "Failure in Carrying Out Orders of Superiors." Thus, the agency's removal action of the appellant was founded upon two separate charges rather than one charge as in the "comparable case." Under these circumstances the Board finds that the agency's decision to remove the appellant was for the promotion of the efficiency of the service. *See* 5 U.S.C. 7513(a).

Accordingly, the initial decision of the presiding official is AFFIRMED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD WARD MUNDY v. DEPARTMENT OF DEFENSE	Docket No. DC031709004

OPINION AND ORDER

Appellant *pro se* filed a petition for appeal with the Board's Washington, D.C. Field Office from the action of the Department of Defense in failing to designate his position as a GS-905-15 attorney, functioning as the "Court Executive" in the U.S. Court of Military Appeals, as a position in the Senior Executive Service (SES).[1] Appellant argued, in pertinent part, that the agency's denial of SES conversion of his function as "Court Executive" to grade GS-905-17 violated section 413(d) of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (the Reform Act), and was a reprisal against him for allegedly exposing "numerous abuses of authority by several high ranking" agency officials in their dealings with the U.S. Court of Military Appeals.

The agency filed a response to appellant's allegations, and a motion to dismiss the petition on the ground that appellant as a GS-15 employee was not eligible for conversion to a SES position. The Director of the Office of Personnel Management (OPM) intervened[2] and asserted that the agency's decision not to convert appellant's position to a SES position was not within the jurisdiction of the Board as appellant's grade as a GS-15 employee rendered him ineligible for conversion to a SES position. Appellant filed motions for orders granting permission to make discovery through interrogatories and written admissions.

By initial decision dated November 1, 1979, the presiding official found that even assuming the truth of appellant's assertions that the position of "Court Executive," GS-17, did exist (which the agency denied) and that appellant had been performing the duties of such a position, such service would have no effect "upon his permanent official assignment" as an attorney, GS-905-15. The presiding official reasoned that pursuant to 5 C.F.R. 317.301 (c) (2), an employee serving under a temporary promotion, detail or assignment in a position designated as SES is not entitled to conversion to the SES "unless the position which the employee encumbered on a permanent basis just prior to the current temporary action has been designated" as SES. The presiding official further determined that if appellant's contention was that his position was misclassified and warranted classification at a level above GS-15, his case would be properly taken to OPM, as the Board was without authority to hear such matters.[3] Finally, the presiding official determined that appellant was not "aggrieved" within the meaning of section 413(j) of the Reform Act as appellant's GS-15 grade level failed to meet the grade level criterion for a SES position set forth in 5 U.S.C. 3132(a) (2). The presiding official denied all of the motions submitted by appellant, granted the agency's motion to dismiss, and dismissed the appeal for want of jurisdiction in the Board.

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[1] Appellant alleged in his petition for appeal that he submitted a copy of his petition to the Office of the Special Counsel (OSC) together with a request that the OSC investigate his allegations of merit system violations and that the OSC intervene in the appeal on his behalf. The OSC has not intervened in this case and appellant stated in his petition for review that the OSC has not formally responded to his request nor has it conducted an investigation of his allegations. Appellant stated further in his petition that he was informally advised in October 1979 that the "Special Counsel believed that he, too, lacked jurisdiction in this matter."

[2] 5 U.S.C. 7701(d)(1); 5 C.F.R. 1201.34(b)(1).

On December 4, 1979, appellant *pro se* timely filed a petition for review with the Board in which he posited that the presiding official's "decision was based upon an erroneous interpretation of statutes, regulations, and decisional law. *See* 5 C.F.R. 1201.115(b). Appellant asserted that the presiding official erred in dismissing his appeal for lack of jurisdiction in the Board, and that the presiding official erred in dismissing his appeal without affording him discovery and a hearing.

The agency's response, filed on January 14, 1980, asserted that appellant as an admitted grade GS-15 employee was not serving in a grade level which would make him eligible for conversion to the SES under section 413 of the Reform Act. The agency argued that the facts necessary to resolve this appeal are uncontroverted and that the presiding official correctly applied the law in his initial decision.

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[3] The Board observes from the record that appellant subsequently requested OPM to reclassify his position from grade GS-15 to grade GS-17 or 18, pursuant to OPM's general authority under 5 U.S.C. 5112 to change a position from one class or grade to another. OPM informed appellant that an affirmative determination that the level of his duties exceeds grade GS-15 and that those duties are properly SES-type duties would preclude classification to GS-16, 17, or 18. It stated that even if the agency elected to designate the position as SES, appellant could only obtain that position by seeking career appointment to the SES through a recruitment program established by the agency in accordance with guidelines established by OPM pursuant to 5 U.S.C. 3393(a).

OPM's response filed on February 19, 1980, contended that appellant's petition for review does not meet the Board's regulatory criteria for review and that appellant's position as a GS-15 employee did not entitle him to an offer of conversion to the SES. Thus, appellant was not "aggrieved" within the meaning of section 413(j) of the Reform Act.

Section 413 sets forth the statutory requirements governing conversion to the SES. Pursuant to section 413(j), OPM shall prescribe regulations to carry out the conversion process. Section 413(j) additionally provides:

> Any employee who is *aggrieved* by any action by any agency under this section [conversion to the SES] is entitled to appeal to the Merit Systems Protection Board under section 7701 of title 5, United States Code (as added by this title). An agency shall take any corrective action which the Merit Systems Protection Board orders in its decision on an appeal under this subsection. (Emphasis supplied.)

The Board's jurisdiction to entertain appellant's case as a SES appeal rests upon our determination of whether appellant has shown error in the presiding official's finding that he is not "aggrieved" under section 413(j) by the agency's declination to convert his position to a SES position. The statutory definition of a SES position is provided in 5 U.S.C. 3132(a)(2):

> "Senior Executive Service position" means any position in an agency which is in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule, *or an equivalent position*, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee—
>
> (A) directs the work of an organizational unit;
>
> (B) is held accountable for the success of one or more specific programs or projects;
>
> (C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;
>
> (D) supervises the work of employees other than personal assistants; *or*
>
> (E) otherwise exercises important policy-making, policy-determining, or other executive functions . . .
>
> (Emphasis supplied.)

Even assuming as true appellant's assertion that as "Court Executive" he performs the managerial and supervisory functions set forth in section 3132(a)(2)(A) through (D), his grade level as a GS-15 employee does not meet the statutorily required grade level of GS-16, 17, or 18 of the General Schedule to qualify his position as a SES position.[4] Appellant argued, however, that as "Court Executive" he is in "an equivalent position" as that phrase was allegedly utilized by Congress in section 3132(a) (2), in terms of the managerial and supervisory functions exercised by an employee in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule. Thus, appellant contended that he is in a position which meets the criteria of a SES position under section 3132(a) (2) (A) through (D), and he was entitled to conversion to the SES. *See* petition for review at 11-12. The agency and OPM argued that the phrase "an equivalent position" as utilized in section 3132(a) (2) refers to positions which are at equivalent levels to the specified positions but which are in other pay systems. OPM initially propounded this construction of section 3132(a) (2) in FPM Bull. 920-7 (March 7, 1979).

Insofar as appellant's contention can be read to say that because his duties involve those listed in section 3132(a) (2) (A) through (D), he occupies "an equivalent position" and was, therefore, eligible for conversion to the SES, the Board finds no support for such a contention. Section 3132(a) (2) requires that the employee not only perform the duties and responsibilities enumerated in subsections (A) through (D), or in subsection (E), but also that he or she meet the grade level criteria.

Appellant also contended that he should be found to meet the grade level criteria because, as he stated in his "Response to OPM Brief":

> The essence of Appellant's complaint is that the Defense Department violated merit system principles by engaging in prohibited personnel practices which deprived Appellant of the supergrade position to which he lawfully was entitled and, simultaneously, that these same prohibited personnel practices also deprived Appellant of a Senior Executive Service (SES) conversion opportunity to which he also was legally entitled.

With reference to this matter, OPM asserted in its brief on intervention before the presiding official that if this contention is connect the agency abused the discretion it had prior to the passage of the Reform Act, and that such an abuse of discretion might be remediable by the Board by an award of retroactive conversion to the SES. We find, however, as noted above, that no such determination has been made by the Special Counsel. Absent that finding, the Board cannot inquire into the contention in the course of this appeal. While the Board may consider an allegation of a prohibited personnel practice as an affirmative defense to an action which is properly appealable to it, 5 U.S.C. 7701(c)(2)(B), the Board cannot "bootstrap" itself into taking jurisdiction of a case by first considering the allegation of a prohibited personnel practice in order to establish that it has appellate jurisdiction under 5 C.F.R. 1201.3(a)(4). *See Wren v. Department of the Army*, 2 MSPB 174 (1980).

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[4] Section 414(a) (1) (B) of the Reform Act terminated the agency's authority to place appellant's position in GS-16, 17, or 18 of the General Schedule. Pursuant to 5 U.S.C. 5108(a), a position may be placed in GS-16, 17, or 18 only by action of the Director of OPM: Appellant's position, thus, is a SES position only if it is "an equivalent position" within the meaning of section 3132(a) (2).

Further, because appellant was never officially appointed to a supergrade position, he has no entitlement to the emoluments and benefits of such a position. In *United States v. Testan*, 424 U.S. 392 (1976), the Court discussed the rights of employees seeking back pay on the basis of an allegedly improper position classification. Contrasting the action then under review with wrongful discharge or suspension, the Court stated:

> There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. (Citations omitted.) 424 U.S. at 402.
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> * * *
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> But federal agencies continue to have discretion in determining most matters relating to the terms and conditions of federal employment. One continuing aspect of this is the rule, mentioned above, that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. *Id.* at 406.

See also Peters v. United States, 534 F.2d 232 (Ct.Cl. 1975); *Hersman v. National Science Foundation*, MSPB Dkt. No. DC031709006 (April 3, 1980).

In order to implement the Congressional mandate establishing the criteria of a SES position, OPM has prescribed by regulation the procedures applicable to conversion to the SES pursuant to section 3132(a)(2)(E).[5] The regulations cover "(a)n employee serving in a position *which meets the grade level* but not the functional criteria for designation as a Senior Executive Service position." 5 C.F.R. 317.301(b)(5), 44 Fed. Reg. 34461 (1979), effective June 15, 1979 (emphasis supplied). No coverage has been provided for an employce who may be in the converse position. Thus, OPM by regulation has construed section 3132(a)(2) to define a SES position as a position in which the employee (1) meets the specified grade level qualifications, and (2) performs the specified managerial and supervisory functions, or otherwise exercises important policy-making functions. Additionally, as noted above, OPM has construed the term "equivalent position" to relate only to positions in pay schedules other than GS or ES.

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[5] OPM is authorized by Congress under 5 U.S.C. 3136 and section 413(j) of the Reform Act to prescribe regulations to carry out the establishment of the SES. OPM has promulgated these regulations at 5 C.F.R. part 317.

While we have found nothing in the legislative history of the Reform Act to indicate Congressional intent with respect to the "equivalent position" language, we note that agency regulations promulgated pursuant to specific Congressional authority are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1968). This deference is particularly appropriate where, as here, the administrative practice at issue involves a contemporaneous construction of a statute (the SES provisions of the Reform Act) by the agency (OPM), "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman, supra*, 380 U.S. at 16, *quoting Power Reacter Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). *See also Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

The Board concludes, upon examination of the foregoing, that the term "an equivalent position" as utilized in section 3132(a)(2) means an employment level comparable to GS-16, 17, or 18 of the General Schedule or level IV or V of the Executive Schedule which is in some other statutory pay system.[6] This construction of the phrase "an equivalent position" reasonably results in the inclusion of SES conversion coverage of employees who occupy positions comparable to GS-16, 17, or 18, or ES-IV or V but who are in other statutory pay systems. Otherwise, these employees would be ineligible for conversion to the SES.

Accordingly, we find that appellant is not in a position entitled to conversion to the SES under section 413 of the Reform Act. Appellant has not been "aggrieved" within the meaning of section 413(j) as he has not "suffered an injury," *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), within the "zone of interests," *Association of Data Processing Service Organizations v. Camp*,

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[6] See the pay systems established under 22 U.S.C. ch. 14, subch. IV, relating to the Foreign Service of the United States, and 38 U.S.C. ch. 73, relating to the Department of Medicine and Surgery, Veterans' Administration.

397 U.S. 150, 153 (1970), protected by section 413 which the Board may redress. As a GS-15 employee appellant's position is outside the scope of section 413 and, hence, he has not been injured by the agency's declination to offer him the opportunity to convert to the SES.

The Board concludes that the presiding official properly decided that appellant's case did not fall within our jurisdictional purview under section 413(j) of the Reform Act. As this appeal was not from an "action which is appealable to the Board," the presiding official did not err in dismissing this appeal without a hearing under 5 U.S.C. 7701(a)(1). Finally, our lack of purview to entertain appellant's appeal renders moot his allegation that the presiding official erred in dismissing his appeal without affording him the opportunity to obtain discovery.

Appellant was unable to sustain his burden of proof of the Board's jurisdiction in his case. 5 C.F.R. 1201.56(a)(2). Nor has his petition for review established that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115(b).

Accordingly, the petition for review of the initial decision of the presiding official is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CAROLYN K. SHERMAN
v.
GENERAL SERVICES ADMINISTRATION

Docket No.
SE075209048

OPINION AND ORDER

The appellant, a cashier with the General Services Administration, was billed by the agency for her share of a $192.00 cash shortage for which she and another cashier were allegedly responsible. She appealed, claiming that the collection action was an adverse action which constituted a reduction in pay. The agency submitted that the Board had no jurisdiction because the action taken was a financial matter handled through the agency's Financial Division rather than a personnel action within the Board's jurisdiction. The presiding official dismissed the appeal as not within the appellate jurisdiction of the Board.

In her petition for review, the appellant restated her argument that the action was a reduction in pay and appealable to the Board as such.

Section 7511(a)(4) of Title 5 of the United States Code defines pay as "the rate of basic pay fixed by law or administrative action for the position held by an employee." Because a bill for monies allegedly due is not a reduction in pay, this action is not within the Board's jurisdiction.

The agency is authorized to attempt the collection of claims by the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966). If the appellant disputes the agency's claim, she can refuse to pay and allow the agency to negotiate with her or sue her in the appropriate court, at which time she may offer her defenses.

The petition for review does not meet the criteria for review by the Board at 5 C.F.R. 1201.115. Therefore, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order, 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM C. ENSMINGER v. DEPARTMENT OF THE ARMY	Docket No. DE531D99002

OPINION AND ORDER

Appellant filed an appeal with the Denver Field Office on October 3, 1979, from the action of the Department of the Army in withholding his within-grade increase for which he was eligible on March 18, 1979. The appellant disputed the several charges of deficiency and the agency responded. Although the date for closing the record in the case was extended twice, the appellant never requested a hearing. Based on the written record, the presiding official concluded that a preponderance of the evidence supported the agency's action in withholding the appellant's within-grade salary increase.

In his petition for review, the appellant protested the fact that the initial decision was made without a hearing and asserted that the decision rendered would have been favorable to him had witnesses testified. He also argued that one of the charges against him, that he did not expand a job description as ordered, involved a duty which was not within the scope of his responsibilities nor a proper expansion of the job description. In response to his petition, the agency stated that the appellant was provided sufficient information regarding the hearing procedures and had several opportunities to request his hearing. The agency also argued that the appellant's contention .regarding the charge of failure to revise the job description was an attempt to introduce new evidence.

The first issue raised by the petition is whether the appellant waived his right to a hearing by his failure to make such a request. That the appellant could appeal the agency action and that he had a right to a hearing is not in doubt under the Civil Service Reform Act. "An employee . . . may submit an appeal to the (Board) from any action which is appealable to the Board under any law, rule or regulation. An appellant shall have the right . . . to a hearing . . ." 5 U.S.C. 7701(a)(1). An appellant is entitled to appeal a determination that his or her work is not of an acceptable level of competence to merit an in-grade step increase under 5 U.S.C. 5335(c). The Board's regulations governing the

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appeal procedure specify that ". . . petitions may use any format . . . but must contain the following: . . . (3) A request for a hearing, if desired." 5 C.F.R. 1201.24. The interim regulations, which governed at the time the appellant filed his appeal state in section 1201.23(b), ". . . appellant may waive his/her right to a hearing and in such an event the decision of the presiding official will be made on the written record."

The first sentence of the appellant's petition states, "I did not realize that without a hearing, a decision would be rendered from a desk in Denver." An examination of the record reveals that the appellant was sent a letter from the Acting Chief Appeals Officer dated June 11, 1979, which notified the appellant of his right to amend his appeal to request a hearing and warned him that his failure to do so would result in his waiving his right to a hearing. He was also urged to review the Board's regulations and was told specifically where the regulations were available for review. By letter dated July 11, 1979, the Acting Chief Appeals Officer again reviewed procedures for requesting a hearing and stated in part ". . . if you do not respond . . . I will assume you do not wish to have a hearing."

The Board notes that the appellant is employed as an Educational Services Officer at a GS-13 level. His claim that he did not understand the notices which explained his appeal rights has little credence. Therefore, the Board holds that by failing to make a specific request for a hearing, he waived that right.

The Board also finds that appellant's argument regarding the charge that he did not perform a duty assigned to him is an attempt to introduce new evidence. Under the regulations, at 5 C.F.R. 1201.15(a), the Board may grant a petition for review if a showing is made that "new and material evidence is available that, despite due diligence, was not available when the record was closed."

The appellant's petition does not assert that the information presented regarding this issue was not available when the record was closed and the Board finds that the proffered sworn statements and other information could have been obtained at any time during the processing of the appeal.

The Board notes that the presiding official based his decision of August 19, 1979, on a preponderance of the evidence. In *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980) at 500, the Board concluded that the standard of proof for determining whether an employee is performing at an acceptable level of competence is a "substantial evidence" test. Because the "preponderance of evidence" test is a higher standard than "substantial evidence", the application of the higher test by the presiding official in this case did not harm the appellant.

Therefore, based on all of the above, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *November 28, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HERMAN LAWRENCE
v.
DISTRICT OF COLUMBIA
GOVERNMENT—DEPARTMENT OF
HUMAN RESOURCES

Docket No.
075209107

ORDER

Appellant has petitioned for review of the initial decision of the presiding official pertaining to denial of appellant's motion for judgment and interlocutory appeal on the following procedural grounds: (1) that responsive pleadings by the respondent agency were filed twenty-five (25) days late after two requests were made by the presiding official for said pleadings, (2) that the agency failed to defend its appeal on the grounds that the responsive pleadings it did file failed to comply with 5 C.F.R. 1201.25; and (3) that the presiding official abused his discretionary authority by failing to impose sanctions against the agency under 5 C.F.R. 1201.43(b). The Board, having fully considered appellant's claims, DENIES the petition.

In the matter of Larry Bohannon, 1 MSPB 15 (1979), the Board held that mere failure to comply with a single isolated order of a presiding official does not constitute a failure to prosecute. In the instant case, although a delay in responding did occur, there is no evidence of repeated violations by respondent agency to the presiding official's requests.

In Hersman v. National Science Foundation, 2 MSPB 132 (1980) at 134, the Board discussed 5 C.F.R. 1201.25 with regard to failure by an agency to provide specific responses to specific allegations in an appellant's petition. We hold in the instant case, as we did in *Hersman,* that an agency's response is sufficient if it contains the agency's reasons for taking an action against appellant, accompanied by supporting documentation. The agency, therefore, did not fail to prosecute.

Holding as we do that the presiding official's conduct did not contravene the rule in *Bohannon* with regard to his discretionary authority to impose sanctions under 5 C.F.R. 1201.43, we find no abuse of discretion. It is clear from the record that, while the agency did not meet the timeliness requirements of the regulations, the appellant was afforded all statutory rights including a hearing. Therefore, no harmful error exists in the record.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court not later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 28, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS F. MAHURIN
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
SL075209066

OPINION AND ORDER

The respondent was removed from his position of Flight Instructor, Department of the Air Force, Richards-Gebaur Air Force Base, effective February 29, 1980, for failing to maintain the required level of flying proficiency for his position.

At the time of the proposed removal, respondent was a 57 year old circuit pilot in the air reserve technician program. The position description for the position to which he was assigned required that he attain Flight Examiner status. In October, 1979, the respondent failed a "check ride" which was required for qualification as a Flight Examiner and on January 16, 1980, the agency issued a notice of proposed removal.

The respondent appealed to the St. Louis Field Office. A hearing was held, and the presiding official found that the agency established by a preponderance of the evidence that the respondent's flying proficiency was not maintained at the level required of his position. He also found, contrary to the agency's assertion, that the respondent's performance and flying proficiency had not been steadily deteriorating since 1974. Finally, the presiding official found age discrimination under the Age Discrimination in Employment Act of 1976. 29 U.S.C. 621 *et seq.* (the Act). He therefore determined that the removal was based upon prohibited personnel practices under 5 U.S.C. 2302(b) (1) (B) (age discrimination) and (b) (4) (willful obstruction of the right to compete for employment), that the removal was not for such cause as would promote the efficiency of the service, and he reversed the agency action.

Section 623 of Title 29 of the United States Code states that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

Section 633a prohibits discrimination on account of age in federal government employment.

The statutory defenses to an action for violation of the Act are found in 29 U.S.C. 623(f) which provides, *inter alia*, that it shall not be unlawful for an employer "to discharge or otherwise discipline an individual for good cause."

The respondent has contended, and the presiding official found, that from April, 1979, when the respondent was rated as fully qualified, until the October check ride, he requested and was denied the opportunity for adequate training to maintain and upgrade his proficiency and that after the October check ride he was removed from all training activities.

The presiding official determined that the respondent received less flying time than other employees. This, the presiding official determined, was disparate treatment which established a prima facie case of discrimination according to the analysis established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

The agency's petition for review presented arguments that the presiding official erred in the application of the Act, in finding disparate treatment under an analysis of the Act, and in failing to apply properly the facts. Specifically, the agency argued that the presiding official improperly compared respondent to all fliers at the installation. Rather, the agency alleged that a comparison should have been made only to these pilots holding the same position as that of the respondent which would reveal that similar amounts of flying time were allowed for all in his position. The agency also contended that the respondent's removal was for "good cause," i.e., his failure on the October 24, 1979 flight check test. Work quality is a legitimate consideration and removal of an employee for such "good cause" is warranted regardless of age.

The agency's arguments in its petition for review miss the thrust of the presiding official's initial decision in the areas discussed below.

A mere comparison of raw flying hours may be misleading. Our record does not disclose the nature of the flight time allowed to other instructors or whether other instructors were regularly denied flying time they had requested and felt they needed to perform adequately and to maintain their skills. The record establishes that from April, 1979 through October 24, 1979, the respondent was systematically denied requested flying time.

The agency does not deny respondent's allegation that almost half of his flying time during this period was attributable to one long flight during which the respondent was not able to practice the skills in which he was deficient. The record also establishes that no other instructor was in respondent's position of having failed a flight check test. TR at 28. According to the evidence, Air Force regulation 60-1 requires that in case of such failure the agency must embark on a program of intensive flight training so as to give the employee every opportunity to pass the test upon reexamination. However, the respondent was not allowed to schedule *any* flight time after his failure of October 24, 1979. A comparison of respondent's flying hours with all other flight instructors would do nothing to alter the findings of the presiding official regarding disparate treatment.

According to *McDonnell Douglas*, the criteria to establish a prima facie case vary according to the factual situation. *Id.* at 802, n.13. It is established that the respondent was within the protected age group; that he was discharged; and that he was limited in a way which adversely affected his status as an employee. The presiding official concluded, based upon the uncontroverted statements regarding the respondent's age made by Colonel Basnett, that the respondent was limited and finally discharged because of his age, thus establishing a prima facie case of age discrimination. After a prima facie showing is established, the burden of going forward with the evidence shifts to the agency to demonstrate reasonable factors other than age for the respondent's discharge. *Marshall v. Westinghous Electric Corporation*, 576 F.2d 588, 590 (5th Cir. 1978). The "good cause" alleged in the agency's petition for review means little when viewed in light of the background for the test upon which such "good cause" is based. Anyone can fail any test without thorough and proper preparation. Respondent was denied the opportunity for such preparation, despite repeated requests. Upon his submission of requests for flying time, he was ignored, and when he placed his own name on the flight schedule it was removed. Such actions were beyond his control. The presiding official heard and saw all the evidence and concluded that no reasonable factor other than age for the discharge was proved by the agency. He therefore found that the respondent was the victim of discrimination under the Act. We cannot say that the presiding official's conclusion was erroneous.

Because we affirm the presiding official's determination that the agency engaged in a prohibited personnel practice under 5 U.S.C. 2302(b)(1)(B), we find it unnecessary to review his finding that the agency did "deceive or willfully obstruct any person with respect to such person's right to compete for employment". 5 U.S.C. 2302(b)(4).

In view of the foregoing, we find that the presiding official correctly decided that the agency action constituted a prohibited personnel practice and that the removal was not for such cause as would promote the efficiency of the service.

Accordingly, the agency petition for review is DENIED. The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this Order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Respondent is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after the respondent's receipt of this order.

Respondent is hereby also notified of the right to such judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after respondent's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *November 28, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK A. PORTLOCK
v.
VETERANS ADMINISTRATION

Docket No.
CH075209051

OPINION AND ORDER

Appellant appealed his removal to the Board's Chicago Field Office which on January 7, 1980, issued an initial decision sustaining the agency's action. On January 25, 1980, the Secretary of the Board received, by certified mail addressed to him, a letter from appellant dated January 23, which was addressed to "EEOC, Board of Review and Appeals." The letter stated that appellant was "appealing the decision of the Merit Systems Protection Board Chicago Field Office."

The Board is aware that the provisions of the Civil Service Reform Act, combined with Reorganization Plan No. 1 of 1978 have occasioned substantial confusion on the part of both employees and agencies concerning the various procedures, choices of forum, and possible election of remedies in adjudicating cases made appealable to the Board which also raise issues of prohibited discrimination. 5 U.S.C. 7702. We believe that procedural steps taken by employees in these cases should be liberally construed in order to find compliance with jurisdictional requirements. *See, e.g.*, 5 U.S.C. 7702(f); 5 C.F.R. 1201.151(b).

Accordingly, we have determined to treat appellant's submission dated January 23, 1980, as a timely filed petition for review pursuant to 5 C.F.R. 1201.114.[1] However, having fully considered appellant's petition for review of the initial decision issued on January 7, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, the Board hereby DENIES the petition.[2]

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[1] Appellant can suffer no prejudice from this determination. He apparently also submitted his January 23 letter to the Equal Employment Opportunity Commission. That agency failed to note that the Board's decision was not yet a final decision under 5 U.S.C. 7702(b)(1). EEOC has not acted on that petition to date. At any rate, appellant is ensured of having the Commission consider the Board's decision on the issue of discrimination.

[2] Since the suspension complied with the requirements of 5 U.S.C. 7513(b)(1), we need not consider the applicability of 5 C.F.R. 752.404(d)(3) referenced in the initial decision at 2.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 28, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RUFO D. VILLALUZ
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
RB083190107

OPINION AND ORDER

The Petition of March 31, 1979 to the Merit Systems Protection Board to reopen and reconsider this case is DENIED.

In reviewing requests to reopen cases of this type, the Board is required to apply the review standards previously established by the Civil Service Commission under Section 772.312 of Title 5, Code of Federal Regulations. The information submitted does not establish that any of the regulatory criteria set forth in the regulations has been met.

The December 14, 1978 appellate decision of the Appeals Review Board set forth a complete discussion of the issues and the applicable law relevant to this case. As noted by the Appeals Review Board, the appellant's deceased husband had never filed an application for annuity following his separation from the Navy and the record failed to show that his civilian service was covered by the Civil Service Retirement law, that Civil Service Retirement deductions were ever made or that he would have been entitled to an annuity. Accordingly, the ARB decision affirming the Bureau's determination that the appellant is not entitled to Civil Service survivor annuity benefits was in accord with the governing statute and regulations.

The request to reopen this case, therefore, is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal, and exhausts the appellant's administrative appeal rights in this case. Any further remedy available lies within the federal court system.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *November 28, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

PHILIP M. ARONSON v. DEPARTMENT OF THE NAVY	Docket No. DC035109062

OPINION AND ORDER

This is a petiton for review of an order of the presiding official affirming the appellant's demotion from the position of Aerospace Engineer, GS-14, to that of Aerospace Engineer, GS-13, by a reduction in force occurring when appellant's position was abolished due to an erosion of duties.

The appellant was a long term perference-eligible employee who, since 1970, was employed as an Aerospace Engineer, GS-861-14, by the Naval Surface Weapons Center, White Oak, Silver Spring, Maryland. On July 30, 1979, the agency notified appellant that his position was being abolished and that his best offer was "demotion from your competitive level (Aerospace Engineer, GS-861-14) to the position of Aerospace Engineer GS-861-13."

Appellant accepted the offer but timely appealed the demotion to the Board contending that the agency evaluation panel incorrectly found him not qualified under 5 C.F.R. 351.701(a) to displace four (4) lower retention subgroup employees in GS-14 level positions.[1]

After reviewing the parties' statements with supporting affidavits and documents, the presiding official found that the appellant was not qualified for these positions and thus was not entitled to displace the four employees under 5 C.F.R. 351.703(a) and 351.704 (1979).

In his petition for review, appellant makes only two contentions: (1) that the presiding official improperly relied on the position descriptions in finding that appellant was not qualified under 5 C.F.R. 351.701(a) for the two Physicist and two Aerospace Engineer positions, and (2) that the presiding official did not require the agency to meet the burden of proof imposed by

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[1] These positions were:
1. Physicist (position no. 27857);
2. Physicist (position no. 27751);
3. Aerospace Engineer (position no. A6829); and
4. Aerospace Engineer (position no. 27866).

5 U.S.C. 7701(c)(1) to show that appellant was not qualified for the above positions by the preponderance of the evidence. We shall discuss them in reverse order.

I.

5 U.S.C. 7701(c)(1) provides

> (T)he decision of the agency shall be sustained . . . only if the agency's decision—
>
> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

In *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), we said that the "application of the regulations set out in 5 C.F.R. Part 351 determines the nature of a covered employee's entitlement under 5 U.S.C. 3502(a) to continued employment." *Id.* at 365. There, we held that this agency determination of an employee's entitlement is the agency "decision" which is appealable to the Board and which will be sustained only if the agency meets its burden to support this decision by a preponderance of the evidence.[2] *Id.*, 365.

Here, the presiding official, anticipating *Losure*, correctly put this burden on the agency, expressly rejecting any contention that the requirements of 5 C.F.R. Part 351 were merely procedural, which would have placed the burden on appellant under 5 U.S.C. 7701(c)(2). Initial Decision at p. 2. The presiding official may nevertheless exercise his discretion under 5 C.F.R. 1201.41(b) to regulate the burden of proof or require the appellant to identify the alleged impropriety with sufficient specificity to enable the agency to properly respond. Thus the presiding official correctly said that in this case it was reasonable to require the appellant to identify the positions for which appellant believed himself to qualify under 5 C.F.R. 351.701. That constitutes a reasonable exercise of the presiding official's discretion in light of the onerous burden which might otherwise be placed on an agency where a large number of other positions exist in the same competitive area. *See Losure v. Interstate Commerce Commission, supra*, 366 n.6.

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[2] In our decision, we held that the agency's evidentiary burden as a matter of course includes proof that the RIF regulations were properly invoked under 5 C.F.R. 351.201(a). Here, the agency met its burden by evidence that it invoked them due to an erosion of duties which would not justify maintaining appellant's position at the GS-14 level. (*See, e.g.*, Betty L. Beebe's affidavit at 1.) This was not contested by appellant.

The exercise of that discretion does not affect the burden of persuasion, which remains with the agency.

Our review of the record does not reveal that the presiding official improperly placed this burden on appellant or that the agency was not required to come forward with evidence that appellant was not qualified for these (4) positions which had in fact been identified in the appeal to the Board. The agency submitted a number of affidavits directly concerning appellant's qualifications for these positions.

Appellant cannot properly say, as he attempts to do, that the agency "has failed to state *in the record* any rational basis for denying appellant's qualifications." (Emphasis in original) (Pet. at 6). For example, in his agency affidavit Paul R. Wessel, a member of the panel which evaluated appellant's qualifications, carefully analyzed appellant's qualifications for each of these positions in light of their duties and responsibilities as required under 5 C.F.R. 351.701. *See also* FPM 351-31, subchapter 7-6 (a)(b) (1972). It was only after reviewing this evidence as well as the evidence submitted by the appellant that the presiding official found that the agency had met its burden to show that appellant was not qualified by the preponderance of the evidence.

II.

We find appellant's contention, which he made for the first time in his petition for review, that the presiding official improperly relied on the position descriptions, submitted by appellant, to be unpersuasive. There was no showing below nor does the appellant contend that they inaccurately reflect the responsibilities and duties of the positions at issue. Thus, the presiding official properly relied on them as useful evidence that appellant was not qualified. *Hurley v. United States*, 575 F.2d 792, 798 (10th Cir. 1978). The position descriptions not only served to sum up the evidence in the record in the form of affidavits and other documentary evidence but also indicated from appellant's perspective what the specific duties and responsibilities were. The position descriptions themselves reflected Office of Personnel Management (OPM) classification standards for the GS-14 level. The codes were only a numerical designation based on position descriptions which facilitated the application of the regulations contained in 5 C.F.R. Part 351. They did not reflect different standards from those contained in the position descriptions, but served simply to classify the positions of record. In short, the presiding official did not apply different standards than those applied by the agency or OPM.

CONCLUSION

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HATTIE B. BAKER
v.
VETERANS ADMINISTRATION

Docket No.
PH035109015

OPINION AND ORDER

The appellant was downgraded from the position of Food Service Worker Leader to the position of Food Service Worker through a reduction-in-force (RIF) procedure at the Veterans Administration Medical Center, Richmond, Virginia, effective October 7, 1979. She appealed to the Board's Philadelphia Field Office alleging that the Veterans Administration manual provides that the agency will not use reduction-in-force procedures to accomplish staffing adjustments and reductions which can properly be made through other means.

The presiding official found that the reorganization was appropriate under the circumstances presented and that the appellant's downgrading was effected in compliance with 5 C.F.R. Part 351.

In the petition for review, it was contended that the presiding official's decision was based on an erroneous interpretation of statute or regulation. Specifically, it was alleged that it was improper to use reduction-in-force procedures for a reduction in the personnel ceiling. Appellant asserted that the ceiling could have been reduced if the Hospital Director had requested additional time. Subsequently, the appellant submitted additional evidence which indicated that the employment ceiling of the V.A. hospital had been increased by forty-eight positions. She contended that the evidence was not available when the record was closed.

The RIF which resulted in the appellant's demotion was the result of an agency decision to abolish an entire competitive level due to a nationwide reduction in the Veterans Administration ceiling. Additional time, as suggested by the appellant, would not have accomplished this agency objective.

The decision of the agency to demote the appellant through a reorganization and later to add positions is not a violation of the procedures under 5 C.F.R. Part 351 nor of the Veterans Administration Manual MP-5, Part 1, Chapter 351(2) (a), which does not forbid the use of RIF procedures. The fact that subsequent to the RIF action, the agency may have received increased staffing levels, would not invalidate the action effected under the circumstances in existence at the time the appellant was down-graded.

Although the appellant submitted notes from a staff meeting which indicated that the hospital ceiling would be increased by forty-eight positions, she did not assert nor submit any evidence that any subsequent staff increases would reestablish the position she formerly held. Therefore, the evidence she submitted is not material evidence.

The Board finds neither error by the presiding official nor that new material evidence is available.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BERNARD FAGEN
v.
SOCIAL SECURITY ADMINISTRATION

Docket No.
NY531D09018

OPINION AND ORDER

Appellant, a File Clerk, GS-4, with the Social Security Administration, Flushing, New York, filed an appeal with the Board's New York Field Office from the agency's decision withholding his within-grade salary increase. The agency cited four general areas of deficiency in its notice to appellant that his performance was not of an acceptable level of competence (ALOC): job knowledge; quality; initiative; and functioning in interpersonal situations. The presiding official found that the notice was so lacking in specificity that appellant was not afforded an opportunity to respond. He decided that this situation was a denial of due process. Citing *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), he found the lack of specificity in the notice to constitute harmful error and reversed the denial of the within grade increase.

The agency in its petition for review has asserted that the presiding official erred in his interpretation of *Parker, supra.* In addition, it has alleged that the presiding official required the establishment of numeric performance standards; exceeded his authority in interpreting the collective bargaining agreement and made a decision contrary to prior decisions of the Board. The agency's main contention is that the decision is contrary to the intent of the Civil Service Reform Act as determined in *Parker*. It has averred that harmful error is an affirmative defense requiring the appellant to show not only error but also to show that in the absence or cure of the error the agency's decision would have been different. 5 C.F.R. 1201.56(c)(3). It has alleged that appellant did not raise harmful error nor did he show that the agency's decision would have been different in the absence of the alleged error.

The presiding official found that the notice only cited general areas of deficiency without delineating specific examples. Based on this notice and appellant's testimony, the presiding official held that the appellant had been denied a fair opportunity to rebut the agency's charges. Therefore, the general notice constituted harmful error.

The record reveals that the appellant had been given several memoranda regarding errors and there had been several discussions between appellant and his supervisor. See agency's hearing exhibits. Given the full set of circumstances, it is difficult to comprehend how appellant was not aware of his deficiencies. Granted no particular examples were given in the notice per se, the presiding official noted that certain memoranda, not referenced in the notice but given to appellant, were much more specific in nature. See Initial Decision at 6. Also, the only area the appellant mentioned as clearly one in which he did not understand his failings was "interpersonal relationships." As for the other categories of deficiencies, he was less affirmative in his allegation that he did not understand his deficiencies. In addition, the presiding official failed to explain how there was error in the other three areas of deficiencies given in the notice. It would appear that the presiding official may have given precedence to form over substance when he stated that the notice did not reference the previous memoranda and discussions. If this is the case, then the principle of *Parker, supra,* and the intent of the Civil Service Reform Act, as expressed in the concept of harmful error, have been violated since the issue is not, *per se,* whether the notice of unacceptable performance alone was sufficiently specific to provide adequate warning to appellant. Rather, the presiding official had to determine whether, under all of the facts and circumstances of the case, appellant had received sufficient information concerning his shortcomings to provide him with reasonable opportunity to improve his performance by overcoming them. As we have previously held, the agency must simply show "by substantial evidence that appellant was aware of what constituted . . . an acceptable level of competence." *Hurt v. Department of Health and Human Services,* 3 MSPB 507 (1980).

To clarify the errors in the other categories of deficiencies and to determine the effect of all of the agency's efforts to correct appellant's deficiencies, the petition for review is GRANTED; the initial decision is VACATED; and the case is REMANDED to the presiding official for reconsideration in compliance with the views expressed in this Opinion and Order, and for further processing as appropriate.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BERNICE S. JONES
v.
VETERANS ADMINISTRATION

Docket No.
PH035199011

OPINION AND ORDER

The appellant was downgraded from the position of Food Service Worker Leader to the position of Food Service Worker through a reduction-in-force (RIF) procedure at the Veterans Administration Medical Center, Richmond, Virginia, effective October 7, 1979. She appealed to the Board's Philadelphia Field Office alleging that the Veterans Administration manual provides that the agency will not use reduction-in-force procedures to accomplish staffing adjustments and reductions which can properly be made through other means.

The presiding official found that the reorganization was appropriate under the circumstances presented and that the appellant's downgrading was effected in compliance with 5 C.F.R. Part 351.

In the petition for review, it is contended that the presiding official's decision was based on an erroneous interpretation of statute or regulation. Specifically, it was alleged that it was improper to use reduction-in-force procedures for a reduction in the personnel ceiling. Appellant asserted that the ceiling could have been reduced if the Hospital Director had requested additional time. Subsequently, the appellant submitted additional evidence which indicated that the employment ceiling of the V.A. hospital had been increased by forty-eight positions.

The RIF which resulted in the appellant's demotion was the result of an agency decision to abolish an entire competitive level due to a nationwide reduction in the Veterans Administration ceiling. Additional time, as suggested by the appellant, would not have accomplished this agency objective.

The decision of the agency to demote the appellant through a reorganization and later to add positions is not a violation of the procedures under 5 C.F.R. Part 351 nor of the Veterans Administration Manual MP-5, Part 1, Chapter 351(2)(a), which does not forbid the use of RIF procedures. The fact that subsequent to the RIF action, the agency may have received increased staffing levels, would not invalidate the action effected under the circumstances in existence at the time the appellant was down-graded.

Although the appellant submitted notes from a staff meeting which indicated that the hospital ceiling would be increased by forty-eight positions, she did not assert nor submit any evidence that any subsequent staff increases would reestablish the position she formerly held. Therefore, the evidence she submitted is not material evidence.

The Board finds neither error by the presiding official nor that new material evidence is available.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARIA A. PENALOZA
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
DA075209009

OPINION AND ORDER

I. THE FACTUAL BACKGROUND

Appellant was employed by respondent, Department of Health, Education, and Welfare (now Department of Health and Human Services) as a claims clerk. As such, she was assigned responsibility for associating incoming mail with claims records in the alphabetical section A-F. Twice a year the supervisor of the section audited the work of the claims clerks. In these desk audits, the amount of unassociated mail and the dates of the mail would be noted.

From approximately mid-December 1978 to February 19, 1979, appellant was absent from work. During this absence various clerks used her desk, and two packages of unassociated mail were discovered in the back of a desk drawer. Investigation revealed that the packages contained a total of 246 pieces of mail of various dates, ranging from November 1977 to December 1978; all of the mail was in appellant's alphabetical section; none of it has been accumulated during appellant's immediate absence. Further investigation led to the proposal of termination, dated April 13, 1979, and ultimately to termination on May 19, 1979.

The agency cited two charges in support of the removal: unacceptable job performance, and concealment of unassociated mail assigned to appellant. The evidence in support of the removal centered on the alleged concealment of mail.

After appellant appealed to the Dallas Field Office of the Board, the agency, in written submissions of June 28, 1979, cited 5 U.S.C. Chapter 75 as authority for the action.[1] The agency disavowed reliance on Chapter 43. After a hearing was held on August 22, 1979, the presiding official sustained the agency action.

In the initial decision of October 11, 1979, it was concluded that the agency's authority for removal was Chapter 75, which, in pertinent part, authorizes removal of employees for such "cause as will promote the efficiency of the service." Section 7513(a). It was concluded that the action was not for "unacceptable performance" as that term is used in Chapter 43. Finally, it was found that the charge of concealment of mail was sustained by a preponderance of the evidence, and that removal was for such cause as will promote the efficiency of the service.

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[1] Citations of chapters and sections refer to Title 5 of the U.S. Code, unless otherwise indicated.

II. ISSUES

Appellant filed a petition for review on November 13, 1979. There was no response from the agency to the petition. The petition challenged the decision on several grounds.

First, it is argued that the removal of appellant was a Chapter 43 action for unacceptable performance, and as a Chapter 43 action, the removal must be reversed for failure to comply with the procedural and substantive rights accorded employees thereunder. A specific violation of section 4303(d) was also alleged.

Alternatively, it is argued that the action violated the requirements of Chapter 75. Further, it is contended that the agency may not remove an employee pursuant to Section 7513, since OPM is required by statute to prescribe the causes sufficient to warrant removal before an agency may proceed under that section.

III. DISCUSSION

Resolution of these issues turns, in large part, on the relationship between Chapter 43 and Chapter 75. This relationship was discussed in our decision, *Wells v. Harris*, 1 MSPB 199 (1979). In *Wells* the central issue was whether, and if so in what manner, adverse actions for "unacceptable performance" may be taken under Section 4303 when an agency has not yet established a performance appraisal system under Section 4302. We held:

> Section 7512(2)(D) states that Chapter 75 is inapplicable to a "reduction in grade or removal under Section 4303 of this title," and Section 7701 provides that the substantial evidence test applies to "an action based on unacceptable performance described in Section 4303." Reading these two sections together, it is apparent that as used in both sections the term "unacceptable performance" is the term of art which is defined at Section 4301. It is not a general term covering all types of poor performance. As we have ruled, if the process of Chapter 43 is not followed, "unacceptable performance" cannot be demonstrated. However, if a determination of inadequate performance is not made under a performance appraisal system provided for in Chapter 43, then

> it may be processed as a Chapter 75 action. At 50 (Footnote omitted).

As was further noted, if any agency chooses to pursue an action under Chapter 75, it must comply with the applicable procedural requirements. We held:

> If an agency sees some advantage in pursuing performance-based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof—and the more difficult standard of demonstrating that the action will promote "efficiency of the service" . . . Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose. At 236.

Thus, the rationale of *Wells* refutes the contention that removal of an employee for performance-based reasons can only be effectuated pursuant to Chapter 43.

It is alternatively argued that even if the action was properly a Chapter 75 removal, the agency failed to give notice of such to appellant. We find this argument to be legally and factually unpersuasive.

Section 7513 affords certain procedural safeguards to an employee whose removal is contemplated.[2] It contains no requirement that the proposed or final decision cite the statute or regulation which authorizes the action. An agency action must contain the elements required by statute, however, and failure to do so may result in reversal. The issue in the instant case, thus, is whether the agency action sufficiently notified appellant of the reason(s) for her removal pursuant to Chapter 75.

It is undisputed that the proposal and decision letters cited "unacceptable job performance" as one ground for the action. "Unacceptable performance" is a term of art defined in Section 4301(3), and its usage could reasonably lead one to conclude that

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[2] Section 7513 reads in pertinent part, as follows:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

Chapter 43 was the basis for the action, at least as to that charge. The proposal letter is misleading to some extent in this regard. However, an action will not be reversed merely "because of technical procedural oversights which have not substantially prejudiced or impaired the employee's rights." *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). Therefore, the Board must consider whether the reference to unacceptable performance caused any harm to appellant; in other words, whether appellant was misled by the reference to such an extent as to impair her right to notice under section 7513.

Even though "unacceptable performance" was cited as one ground for the action, the second ground cited gave sufficient notice that the action was taken pursuant to Chapter 75. The events cited in the second charge, in fact, are the sole basis for the action—concealment of 246 pieces of unassociated mail. The details recited in support of both charges, and the exhibits incorporated by reference, addressed the charge of concealment.[3]

Therefore, appellant was notified with sufficient particularity that she was charged with concealing mail matter. Moreover, appellant was informed before the hearing that the action was based solely on Chapter 75, and reliance on Chapter 43 was disavowed. Also, in response to oral pre-hearing motions, the agency reiterated its position. This being so, there was no substantial harm to appellant's rights when the agency presented its case as a Chapter 75 action. Further, by virtue of having taken the action under Chapter 75, the agency subjected itself to the greater burden of proof applicable to such cases. We conclude that appellant has failed to demonstrate harm by the use of the term "unacceptable performance" in charge 1. *See* 5 U.S.C. 7701 (c) (2) (A) and 5 C.F.R. 1201.56(b) (1) and (c) (3).

Appellant also argued that no action may be taken pursuant to Section 7513 until OPM prescribes, by regulation, what are adequate causes for removal. OPM declined to compile a list of causes for removal which promote the efficiency of the service because "the term has been in law for many years and its meaning determined by many appellate bodies." 44 Fed. Reg. 47030 (1979).

This comment is supported by courts which have considered the term as used in the context of prior statutes concerned with removal of federal government employees. As the D.C. Circuit Court stated in *Norton v. Macy*, 417 F.2d 1161, 1165 (1969):

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[3] The proposal did cite past desk audits and might lead one to conclude they were cited to support the first charge. However, the predominant tone of the letter emphasizes the concealment of mail, and recitation of past audits supports the inference that appellant had a motive for concealing mail.

> Congress did not attempt a definition of "cause," providing only that it must be one that would promote the efficiency of the service. Some latitude was thus left to those responsible for administering the Act. Faithfulness to its purpose to reward those who served in the armed forces by granting a protective preference must be maintained. But the preference granted does not protect a veteran in a position when removal therefrom, viewed in the light of competing policies and all the circumstances, can reasonably be said to lead to increased efficiency in * * * governmental operations. (Footnotes omitted)

In the instant case, the action was based on performance related reasons. The nexus between concealing mail sent to the agency for action, and the harm which results is apparent. Such harm was detailed in the proposal letter, and we hold that the conclusion of the presiding official, that the action warranted removal for the efficiency of the service, correctly applied Section 7513. In accordance with the law, it is within the Board's authority to determine on appeal whether an individual action promotes the efficiency of the service.

The last contention advanced by appellant is that the agency violated Section 4303(d) by referring to a prior warning notice issued to her in 1977. Inasmuch as we have found that Section 4303 is inapplicable to this case, we will give no further consideration to this contention.

IV. CONCLUSION

Appellant has failed to establish that the initial decision was based on an erroneous interpretation of statute or regulation. The action was based on the alleged misconduct of appellant in concealing mail, and although the agency used the term "unacceptable performance" in the proposal and final letter, we find no evidence of harmful error in this regard. An agency may remove an employee for performance-based reasons pursuant to Chapter 75.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

Robert E. Taylor,
Secretary.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN W. RITCHEY
v.
UNITED STATES POSTAL SERVICE

Docket No.
PH075299058

ORDER

The initial decision of the presiding official dismissed without prejudice the appeal from appellant's removal after finding that the Board lacked jurisdiction on the matter appealed. This disposition of the case was made because the record showed that the appellant had initiated a discrimination complaint within the agency on the appealable matter, and the agency had not issued a decision on the complaint, nor had 120 days elapsed. The Board's regulations at 5 C.F.R. 1201.154 implementing 5 U.S.C. 7702 (a)(2), provide that the Board can accept such appeals only if the conditions cited therein, and quoted in the initial decision, prevail.

The Board notes that, as more than 120 days have elapsed since the appellant initiated the discrimination complaint within the agency, the passage of time and events have rendered appellant's request that the Board process the appeal regardless of the agency's action moot. If no decision has yet been issued by the agency, the appellant may file an appeal from the removal action within 20 days of the receipt of this order.

Moreover, the petition requesting review of the initial decision of the presiding official failed to meet the criteria of the Board's regulations (5 C.F.R. 1201.115) for granting a petition and therefore is DENIED for failure to establish error by the presiding official in interpreting law or regulation, or the existence of new and material evidence.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID P. WEINBERGER
v.
U.S. POSTAL SERVICE

Docket No.
AT075209074

OPINION AND ORDER

The appellant, a preference eligible, received a career appointment in the Postal Service, effective February 20, 1979, as a Distribution Machine Clerk, PS-5. He held this position until his employment was terminated, effective August 31, 1979, for "conduct unbecoming a Postal employee." He thereafter filed a timely petition with the Board's Atlanta Field Office, wherein he argued, *inter alia,* that because of prior employment with the U.S. Department of Agriculture, in the position of Plant Protection Aide, GS-4, from April 23, 1978 through February 19, 1979, he was entitled to appeal the termination action to the Board.

In the initial field office decision, the presiding official found that 5 U.S.C. 7511(a)(1)(B) provides appeal rights for: ". . . a preference eligible in the United States Postal Service or the Postal Rate Commission, who had completed one year of current continuous service in the *same or similar positions*." (Emphasis added). He further found, based upon a comparison of the duties and responsibilities of the positions of Distribution Machine Clerk, PS-5, and Plant Protection Aide, GS-4, that these were not the "same or similar positions." Accordingly, the presiding official concluded that appellant did not meet the criteria in 5 U.S.C. 7511(a)(1)(B), and the appeal was dismissed as not within the Board's appellate jurisdiction.

In his petition for review, and in subsequent submissions, appellant cites 5 U.S.C. 7701(a), which provides, in pertinent part, that an employee may submit an appeal to the Board "from any action which is appealable to the Board under law, rule, or regulation." Appellant contends that under pertinent provisions of the collective bargaining agreement applicable to his clerk craft, he was only required to have completed a 90 calendar-day term of probation in order to have been entitled to appeal his termination by way of the grievance-arbitration route. Appellant argues that since Postal Service collective bargaining agreements are explicitly authorized by act of Congress, such agreements should be viewed as rules or regulations for purpose of 5 U.S.C. 7701(a). Thus, appellant asserts, the presiding official erred in his interpretation of statute, and the initial decision should be reversed by the Board. Appellant has also submitted a copy of a Notification of Personnel Action, PS Form 50, which shows that he resigned on June 1, 1979, and was reinstated on June 4, 1979. This evidence, appellant contends, supports his claim that he had no break in service while employed in the position of Distribution Machine Clerk and that, as such, he completed the 90 days probationary period mandated by the Postal Service.

In its response to the petition, the Postal Service asserts that the PS Form 50, in fact, shows a break in appellant's service; and that, in any case, the Postal Service's 90 day probationary period is irrelevant to appellant's statutory appeal rights.

The instant action was commenced after January 10, 1979, and is therefore governed by the Civil Service Reform Act of 1978. *See* Title IX, Section 902(b), 92 Stat. 1224. As a preference eligible employee of the Postal Service, who had not completed one year of current continuous employment in the same or similar positions when he was terminated, appellant is excluded from coverage under both Chapter 43 and Chapter 75, Subchapter II of 5 U.S.C. 4303(f) (3) and 7511(a) (B).

Further, the Board notes that a review of the legislative history of the Reform Act demonstrates that the phrase "one year of current continuous service in the same or similar positions" was intended to constitute the same definition of the extent of coverage afforded to employees in appellant's position as pre-act law and regulations. S. Rep. No. 969, 95th Cong. 2d Sess. 48 (1978). The meaning of this phrase as used in Civil Service regulations at the time the Reform Act enacted was set forth in FPM Supp. 752-1, subchapter S 2-3a (3), as follows:

> Current continuous employment in a position outside the competitive service may be either (i) employment in one position without a break of a workday or (ii) employment in more than one position *in the same line of work* without a break of a workday. (Emphasis added.)

With respect to appellant's assertion concerning 5 U.S.C. 7701(a), as noted above, applicable law excludes appellant from coverage under both Chapter 43 and Chapter 75, Subchapter II or 5 U.S.C. Further, appropriate regulations issued pursuant to the Reform Act do not provide appellant a right of appeal. Finally, the provisions of the Postal Service's collective bargaining agreement on which appellant relies do not create jurisdiction in the Board but relate only to grievance-arbitration rights, which are entirely distinct from rights of appeal to the Board.

In light of the plain meaning of the Reform Act, and the pertinent portions of the legislative history as reviewed above, the Board finds that appellant is not entitled to appeal his termination from employment to the Board.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

BESSIE M. WILLIAMS
v.
VETERANS ADMINISTRATION

Docket No.
PH035109016

OPINION AND ORDER

The appellant was downgraded from the position of Food Service Worker Leader to the position of Food Service Worker through a reduction-in-force (RIF) procedure at the Veterans Administration Medical Center, Richmond, Virginia, effective October 7, 1979. She appealed to the Board's Philadelphia Field Office alleging that the Veterans Administration manual provides that the agency will not use reduction-in-force procedures to accomplish staffing adjustments and reductions which can properly be made through other means.

The presiding official found that the reorganization was appropriate under the circumstances presented and that the appellant's downgrading was effected in compliance with 5 C.F.R. Part 351.

In the petition for review, it is contended that the presiding official's decision was based on an erroneous interpretation of statute or regulation. Specifically, it was alleged that it was improper to use reduction-in-force procedures for a reduction in the personnel ceiling. Appellant asserted that the ceiling could have been reduced if the Hospital Director had requested additional time. Subsequently, the appellant submitted additional evidence which indicated that the employment ceiling of the V.A. hospital had been increased by forty-eight positions.

The RIF which resulted in the appellant's demotion was the result of an agency decision to abolish an entire competitive level due to a nationwide reduction in the Veterans Administration ceiling. Additional time, as suggested by the appellant, would not have accomplished this agency objective.

The decision of the agency to demote the appellant through a reorganization and later to add positions is not a violation of the procedures under 5 C.F.R. Part 351 nor of the Veterans Administration Manual MP-5, Part 1, Chapter 351(2) (a), which does not forbid the use of RIF procedures. The fact that subsequent to the RIF action, the agency may have received increased staffing levels, would not invalidate the action effected under the circumstances in existence at the time the appellant was down-graded.

Although the appellant submitted notes from a staff meeting which indicated that the hospital ceiling would be increased by forty-eight positions, she did not assert nor submit any evidence that any subsequent staff increases would reestablish the position she formerly held. Therefore, the evidence she submitted is not material evidence.

The Board finds neither error by the presiding official nor that new material evidence is available.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 1, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Herminiano D. Cerezo
v.
Office of Personnel Management

Docket No.
RB83190031

Opinion and Order

The petition of May 1, 1979 to the Merit Systems Protection Board to reopen and reconsider this case is DENIED.

In reviewing requests to reopen cases of this type, the Board is required to apply the review standards previously established by the Civil Service Commission under Section 772.312 of Title 5, Code of Federal Regulations. The information submitted does not establish that any of the regulatory criteria set forth in the regulations has been met.

The November 17, 1978, appellate decision of the Appeals Review Board set forth a complete discussion of the issues and the applicable law relevant to this case. As noted by the Appeals Review Board, the appellant's civilian service in the Navy Exchange Service was not creditable under the Civil Service Retirement System and that his service under the Missing Persons Act was not creditable since he received a refund for deductions made. The conclusion by the Appeals Review Board was correct in finding that the appellant was not entitled to Civil Service Retirement benefits, since his records failed to show any creditable service upon which entitlement could be based.

The request to reopen this case, therefore, is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal, and exhausts the appellant's administrative appeal rights in this case. Any further remedy available lies within the federal court system.

For the Board:

Robert E. Taylor,
Secretary.

Washington, D.C., *December 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOROTHY J. GANTT
v.
DEPARTMENT OF THE NAVY

Docket No.
DC531D09021

OPINION AND ORDER

Appellant's within-grade increase was denied by the agency. She appealed to the Board's Washington, D.C. Field Office, and her appeal was dismissed as untimely filed. She petitioned for review, and the agency responded.

We hereby excuse appellant's untimeliness for good cause shown. 5 C.F.R. 1201.12. Appellant's union representative contended that he made an effort to hand deliver the appeal to the field office on the day that it was due, but that he was unable to locate the office before its closing hour. He did locate the office on the next business day at which time he hand-delivered the appeal. 5 C.F.R. 1201.22(b) provides that a petition is considered filed on the date of mailing or, if personally delivered, on the date of receipt. Because of the representative's good faith attempt to effect timely delivery on appellant's behalf, we find that good cause has been shown to excuse the untimeliness of the appeal by one business day.

Subsequent to filing the instant appeal, appellant was removed from her position. She appealed the removal action, and has moved for joinder of the two appeals under 5 C.F.R. 1201.36. As her removal appeal has already been adjudicated by the Washington, D.C. Field Office, and a separate petition for review of that initial decision has been filed, we deny appellant's motion for joinder.

Accordingly, the petition for review is GRANTED, the initial decision is VACATED, and the case is REMANDED to the Board's Washington, D.C. Field Office for adjudication of the instant appeal.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KENNETH R. CORLEY
v.
FEDERAL AVIATION ADMINISTRATION

Docket No.
DA075209060

OPINION AND ORDER

I. BACKGROUND

The appellant, Kenneth R. Corley, was an Air Traffic Control Specialist with the Federal Aviation Administration in Oklahoma City, Oklahoma. On August 25, 1979, the agency demoted him from GS-13 to GS-11, and transferred him to another post of duty in Houston, Taxes. The grounds for this adverse action were two: First, the agency determined that the appellant exhibited willful minconduct in the performance of his duties by failure to remedy two so-called "system errors," which are the occurrence of less than the minimum standard of separation between aircraft—three miles laterally and 1,000 feet vertically. Second, the agency found that in the same instances, the appellant failed to comply with agency operational procedures requiring that the system errors be reported to his supervisor.

On appeal to the Dallas Field Office of the Merit Systems Protection Board, the presiding official reversed the agency's reduction in the appellant's grade, in an initial decision dated December 28, 1979. After a two-day hearing, the presiding official found that, although the charges would support the imposition of an appropriate penalty, those charges were not proved by the agency by the preponderance of the evidence, as required under 5 U.S.C. 7701(c)(1)(B). The presiding official made no determination with respect to the appellant's transfer, finding that reassignment is not a matter appealable to the Board.

II. ISSUES RAISED FOR REVIEW

The principal basis for review argued by the agency in its petition for review of the initial decision was that the presiding official erroneously interpreted the preponderance of the evidence rule in making his analysis and findings, with regard to one of the two system errors that the agency charged the appellant failed to remedy or report. Specifically, the agency contended in its petition that the presiding official failed to use the balancing test that is necessary in determining where the preponderance of the evidence rests. The agency argued, further, that the presiding official referred repeatedly in his initial decision to testimony that was not in the record, "conveniently ignored" the agency's documentary evidence, and failed to make the credibility findings that are necessary in assessing the preponderance of the evidence.

The appellant responded to the agency's petition for review with the argument that the presiding official correctly defined and applied the preponderance of the evidence standard as required by statute.

The Board finds that the agency's petition for review meets the requirements of 5 U.S.C. 7701(e)(1) and 5 C.F.R. 1201.113 and 1201.115. Accordingly, the petition for review is hereby GRANTED.

III. DISCUSSION

Before examining the evidence in his initial decision, the presiding official noted that the crux of the willful misconduct charge was not that the appellant had allowed the system errors to occur, but rather that the appellant had failed to take corrective action once the errors did occur. Without assistance or objection by the parties, the presiding official defined "willful misconduct" as "a course of action which shows an actual or deliberate intention to harm or injure another; an intentional disregard of a known duty which is necessary for the safety of others or their property." Initial Decision at 3. Based on that definition, the presiding official framed the main issues as whether a system error occurred, whether the appellant knew that a system error occurred, and whether he intentionally disregarded his duty by failing to take the appropriate corrective action.

Before examining the specific charges, the presiding official discussed the applicable burden of proof:

> Ordinarily an action based on unacceptable performance of an employee's duties would only have to be supported by substantial evidence as provided in 5 U.S.C. Section 7701 (c)(1)(A). However, since the agency has chosen, instead of basing the action on appellant's unacceptable performance, of charging the appellant with willful misconduct, then the action must be supported by a preponderance of the evidence in accordance with 5 U.S.C. Section 7701(c)(1)(B).

Initial Decision at 4. Later, in weighing the evidence under this standard, the presiding official quoted the definition of "preponderance of the evidence" in the Board's regulations at 5 C.F.R. section 1201.56(c):

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

Quoted in Initial Decision at 5. The presiding official, thus, indicated his awareness of the applicable burden of proof for this appeal and the manner in which it is properly applied.

The presiding official then considered the first alleged system error, involving an Aztec airplane trailing a Cessna plane by 2½ miles while approaching the landing strip in violation of the three mile minimum separation standard. He found that the agency did not prove by a preponderance of the evidence that a system error had occurred in this instance, and that, even if one had occurred, the preponderance of the evidence established that the appellant was not aware of such an error. Since the petition for review specifically restricted its allegations of error on the part of the presiding official to the second alleged system error, the propriety of the presiding official's findings with respect to the first alleged system error need not be reviewed.

The second alleged system error was to have occurred within twenty-four minutes of the first, involving an American airplane and a Frontier Airlines plane. This incident was nearly identical to the first incident factually, except that the appellant admitted committing the system error and intentionally maintaining the 2½ mile separation between the two airplanes. The agency charged, and the facility chief testified, that the failure to direct the second of the two airplanes to break out of the approach pattern, so that the remaining planes would have maintained the three mile separation minimum, constituted willful misconduct.

As noted in the presiding official's initial decision, the appellant testified that he believed it safer to allow the 2½ mile separation between the aircraft in approaching for a landing than to instruct one of them to change course. The appellant explained that one side of the landing approach was already occupied by an airplane fiying a holding pattern at the same altitude, and that the other side involved air space handled by another controller who was also very busy at the time because of a sudden dust storm. The other controller, who testified on behalf of the appellant, endorsed the appellant's explanation.

Based on this testimony, the presiding official concluded that the agency did not prove by a preponderance of the evidence that the appellant was culpable of willful misconduct in the performance of his duties. The presiding official found that the appellant's explanation for maintaining the 2½ mile separation between the aircraft "appears to be reasonable and was not rebutted by other testimony." Initial Decision at 7.

The agency argued in its petition for review that the presiding official made no attempt to set out the context in which the second alleged system error occurred and failed to refer to the evidence introduced by both parties. An examination of the initial decision shows that, while the context was in fact discussed, the presiding official did not refer to the testimony of all of the agency's witnesses. More specifically, as indicated by the agency in its petition, the presiding official made no mention of the testimony of agency witnesses Alvarez and Zimmerman, and only brief mention of the testimony of agency witness White. In this connection, the agency asserted that the presiding official failed to make the requisite credibility determinations that bear on his assessment of the preponderance of the evidence.

We note from our review of the hearing transcript that, although Mr. White's testimony bore most directly on what the appellant should have done under the circumstances, Hearing Transcript at 96-100, that testimony was not as clear as the agency argued in its petition. The "missed approach mode" procedure, which the agency alleged the appellant should have followed, was first clarified in the petition for review. We believe, therefore, that Mr. White's testimony received adequate treatment in the initial decision.

To the extent that it is not repetitious of Mr. White's testimony, Mr. Zimmerman's testimony relates almost exclusively to the first alleged system error, which the petition excluded from review. We note that the agency's summary report of the American-Frontier incident was raised on cross-examination by the appellant's attorney, but there was no discussion of the appellant's actions with respect to this incident. Hearing Transcript at 185-90. We find, accordingly, that the presiding official did not err in omitting reference to Mr. Zimmerman's testimony in analyzing the second alleged system error.

Finally, the testimony of Mr. Alvarez with regard to whether there was too much aircraft activity at the time the second alleged system error occurred for the appellant to have sufficient air space to maneuver the aircraft in question differently, based on his study of tape recordings of radio transmissions during the time in question, Hearing Transcript at 242, does tend to contradict the appellant's testimony that he was very busy at the time, Hearing Transcript at 390. We note, however, that the appellant's unchallenged testimony that radio transmissions alone do not adequately reflect the level of activity during the time in question casts some doubt on Mr. Alvarez's testimony in this regard. Hearing Transcript at 389. Moreover, the testimony of one of the appellant's witnesses, a fellow controller who was on duty at that time, substantiates the appellant's testimony. Hearing Transcript at 274, 277. We find no error, therefore, in the presiding official's implicitly ascribing greater credibility to the testimony of an eye-witness than to the testimony of a witness whose views were not based on first-hand observation.

The agency stated further in its petition that the "only reason" given by the presiding official for finding that the agency did not prove its charge of willful misconduct, by the preponderance of the evidence, was that the appellant's explanation for not altering the course of one of the airplanes within 2½ miles of the other "appears reasonable and was not rebutted. . . ." Initial Decision at 7. This statement suggests that the presiding official's reasoning was faulty, without showing how. The Board finds no error in this line of reasoning, which is consistent with the presiding official's unchallenged definition of willful misconduct as the intentional disregard of the safety of others by one who has a duty to protect it. The choice of what appears to be the least dangerous of a number of alternate courses of action cannot constitute willful misconduct under that definition.

The agency argued additionally in its petition that the presiding official's analysis of the second specification of willful misconduct exhibits "gross distortion and totally (sic) mischaracterization," listing four instances where the presiding official mentioned testimony of the appellant that the agency claimed was not in the record. Our review of the transcript of the hearing and the documentary evidence of record, however, indicates that the presiding official's characterization of the evidence introduced by the appellant is indeed fair. A point by point analysis is possible, but not warranted here. *See, e.g.*, Transcript of Hearing at 276-277, 385-387, and 388-392.

The agency also argued in its petition that the presiding official ignored all of the documentary evidence of record regarding the extreme importance of the separation standard in controlling aircraft. The presiding official actually cited a provision of the agency handbook in this connection, however, concluding that "the primary duty of an Air Traffic Control Specialist, such as the appellant, is to maintain minimum separation standards to insure safe air travel." Initial Decision at 2. We find in addition that the agency's further criticisms of the presiding official's misstatement of two technical points, made in testimony by agency witnesses, do not relate directly to any of the legal issues under consideration and are, therefore, insignificant.

The second charge upon which the agency based appellant's reduction in grade was his failure to report the two alleged system errors to his supervisor, as specifically required in the agency handbook. With regard to the incident involving the Aztec and the Cessna airplanes, the presiding official found that the appellant had not violated the operational rule because the agency failed to prove, by the preponderance of the evidence, that the system error had actually occurred, or that the appellant knew it had occurred. With regard to the incident involving the American and Frontier airplanes, the presiding official found that the agency did not prove the appellant's violation, by the preponderance of the evidence, because it did not submit any evidence challenging the appellant's testimony that he had reported the second incident to his supervisor twice on the day that it occurred. Again, we find no error in the presiding official's line of reasoning, which is supported by the record.

The Board concludes, therefore, that the presiding official correctly found that the agency failed to prove its charges against the appellant by the preponderance of the evidence. Our review of the record suggests that this failure to meet its burden of proof is attributable, at least in part, to the fact that the agency neglected to present more complete testimony on what the appellant should have done to remedy the American-Frontier system error and direct rebuttal testimony with regard to the appellant's convincing defense.

Accordingly, the initial decision of the presiding official dated December 28, 1979, is hereby AFFIRMED. The agency is ORDERED to cancel its action demoting the appellant and to furnish to the Dallas Field Office of the Board a copy of the official Notification of Personal Action documenting compliance with this order within ten calendar days of receipt of this decision.

This is the final decision of the Board in this appeal. The appellant is hereby advised of his statutory right under 5 U.S.C. 7703 to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS P. KUAHINE
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075209032

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on November 6, 1979, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition. The Board hereby REOPENS the initial decision on its own motion, however, for the limited purpose of clarifying one of the findings therein. 5 C.F.R. 1201.117.

The presiding official found that the agency had not committed an unfair labor practice under the circumstances of the case. Initial decision at 11. The Board does not have jurisdiction to decide allegations of unfair labor practices, and, to the extent that the initial decision implied jurisdiction, we find its holding overly broad. It is not our intention here to foreclose the possibility that such an allegation might be raised and considered as an affirmative defense of an appellant. However, in this case, the initial decision should reflect the limits of the jurisdiction granted to this Board.

The initial decision is AFFIRMED, as MODIFIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HENRY E. NAUERT v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION	Docket No. DA035109056

ORDER

The appellant appealed the agency's action in reducing his grade from GS-14 to GS-13. Following a hearing on the jurisdictional question, the presiding official dismissed the appeal as not within the Board's jurisdiction upon finding that the position was reclassified due to a change in the classification standards or an error in the original classification, but not, as claimed by the appellant, as a result of a deliberate or gradual change in assigned duties, which would have required the agency to use reduction-in-force procedures. *See* 5 C.F.R. 351.201(a).

In his petition for review the appellant challenges the credibility findings of the presiding official and offers additional information in support of his position.

Disagreement with the presiding official's credibility findings and conclusions does not warrant reopening. *See Barber v. Army*, 3 MSPB 41 (1980), and *Weaver v. Navy*, 2 MSPB 297 (1980). Moreover, the appellant has not demonstrated that the new matter submitted with his petition is material or that, despite due diligence, it was not available previously when the record was closed.

Accordingly, the petition fails to meet the criteria for review set forth at 5 C.F.R. 1201.115 and is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RALPH G. PHELPS
v.
U.S. DEPARTMENT OF INTERIOR

Docket No.
DA035109046

OPINION AND ORDER

Respondent appealed the reduction-in-force (RIF) action of the U.S. Department of Interior, Bureau of Indian Affairs, Albuquerque, New Mexico, whereby he was separated from the position of Electrical Worker, WG-2805-8, effective December 1, 1979. He asserted that the July 29, 1979, action of the agency in reclassifying his position of Building Repairman, WG-4740-9, to the position of Electrical Worker ultimately caused his separation through the RIF. The presiding official found no basis for review of the classification as respondent had not been reduced in grade or pay, but he did analyze the allegations to the extent they raised a question concerning the bona fides of the RIF. In essence, the presiding official reviewed the respondent's allegation that the reclassification of his position was the initial part of a conspiracy or subterfuge which culminated in his separation through a RIF. After examining the evidence and the various contentions, the presiding official found that the RIF was not a bona fide one as it impacted on respondent. Therefore, he reversed the agency's action as it was not found to be supported by a preponderance of the evidence.

The agency's petition for review has asserted that the presiding official's decision was not in accordance with the law. Specifically, it has contended that his findings and ultimate decision were based entirely on matters relating to the classification of respondent's position for which there is no basis for review by the Board. The presiding official reviewed the classification action only in its impact on the RIF and ultimate separation of the respondent. The agency has not disputed the Board's authority to do this, but maintained that only the classification has been reviewed. Consequently, the entire petition has addressed the circumstances surrounding the classification. It has averred that the acceptance of respondent's testimony that the position of Maintenance Mechanic, WG-9, and Electrical Worker, WG-8, had identical duties was erroneous. However, the presiding official noted that the agency presented no evidence to contradict the testimony of respondent and his witnesses on this point and the agency has set forth no persuasive reason why such evidence should be considered at this late date.

In *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), the Board held that an agency in a RIF has both the burden of proof and the burden of persuasion. The Board ruled that an agency could establish a prima facie case that the RIF was invoked for legitimate management reasons by coming forward with "evidence showing a RIF undertaken for any of the reasons specified in 5 C.F.R. 351.201(a)." *Losure* at 363. Normally, this type of evidence would carry both the burdens of proof and persuasion unless the employee presented rebuttal evidence.

In this case, the agency asserted that the RIF was taken due to a reorganization, one of the reasons given in 5 C.F.R. 351.201(a). However, when the employee alleged that the "new" position created was simply a new description for the duties that he continued to perform, the agency made no attempt to rebut this allegation. Therefore, the Board finds that the agency has failed to carry the burdens of proof and persuasion as dictated by *Losure, supra*. The Board finds the agency's argument that the presiding official conducted only a classification review as opposed to a review of the RIF to be without merit. He did, as stated in the decision, review the classification only as it impacted on the bona fides of the RIF. To do less would be to render meaningless an employee's right to dispute the merits of a RIF action. *Cf. Parker v. Defense Logistics Agency*, 1 MSPB 489, 497-499 (1980).

The Board, having fully considered the agency's petition for review of the initial decision and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Joseph L. Simmins
v.
Department of the Navy
Docket No. PH07528010039

Charles A. Brown
v.
Department of the Navy
Docket No. PH07528010046

Gary W. Baker
v.
Department of the Navy
Docket No. PH07528010047

Charles W. Washburn
v.
Department of the Navy
Docket No. PH07528010048

John F. Phelan
v.
Department of the Navy
Docket No. PH07528010049

James L. Lincoln
v.
Department of the Navy
Docket No. PH07528010050

Timothy P. Kerr
v.
Department of the Navy
Docket No. PH07528010051

Opinion and Order

The appellants, Gary W. Baker, James L. Lincoln, Timothy P. Kerr, Charles W. Washburn, John F. Phelan, Joseph L. Simmins, and Charles A. Brown, were removed from their positions as Insulation Workers at the Philadelphia Naval Shipyard of the agency, the Department of the Navy, based on charges of falsifying their employment applications with regard to relevant prior experience. The Philadelphia Field Office of the Merit Systems Protection Board affirmed all seven removal actions on appeal, and the appellants have petitioned for review of the initial decisions which were issued simultaneously on July 31, 1980.[1] We hereby

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[1] Although individual initial decisions were rendered, the appeals of Messrs. Baker, Lincoln, Kerr, Washburn, and Phelan were consolidated for purposes

GRANT the petitions for review and CONSOLIDATE all seven appeals for purposes of review. 5 U.S.C. § 7701(e) and (f).

The appellants were part of a group of approximately twenty agency Insulation Workers who were removed for falsifying their applications for employment. The removal actions resulted from an investigation by the Office of Personnel Management (OPM) into the background of 52 Insulation Workers at the Philadelphia Naval Shipyard, prompted by information transmitted to the agency's Personnel Operations Branch. The agency based its actions on OPM investigation reports.

All but one of the seven appellants admitted listing falsely on their applications an average of 2 years of previous work experience in positions similar to that of Insulation Worker. In fact, they had no such work experience,[2] except for Mr. Baker who actually had 11 months of the 24 months' experience he claimed, and Mr. Washburn who had 3 of the 18 months he claimed.[3]

Appellant Brown denied that the experience he listed on his employment application was false, but the presiding official found the charge to be supported by the preponderance of the evidence based on his credibility determinations. Mr. Brown challenged that finding in his petition for review. Since the allegation of error was merely conclusory, however, it is insufficient to trigger a full review of the record with respect to the merits of the charge. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

All of the appellants have contended in their petitions for review that the presiding officials erred in not finding that their removal was improper because other employees charged with falsification of their employment applications received lesser penalties. The presiding officials found that the lesser penalties imposed in 1979 were not relevant to these appeals because the false statements made by the other employees in those earlier cases related only to their general character and did not bear directly on their qualifications for the positions which they sought. Additionally, the presiding official in the appeals of Messrs. Simmins and Brown found unsubstantiated their allegations that other employees, who were under investigation at the same time they were, had admitted

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of a hearing by Presiding Official Roger A. Schwartz, as were the appeals of Messrs. Simmins and Brown by Presiding Official Frederick L. Fishman. In referring to the transcripts of these hearings, we will differentiate by using the terms Schwartz Hearing Transcript and Fishman Hearing Transcript, respectively.

[2] Schwartz Hearing Transcript at 5-6, 14, 48, 53, and 59; Fishman Hearing Transcript at 35.

[3] Schwartz Hearing Transcript at 53 and 61.

falsifying their applications and yet were not removed. We conclude that the record supports the findings of the presiding officials that the appellants failed to prove disparate treatment. *See* 5 C.F.R. § 1201.56(b).

Appellants Simmins and Brown have urged in their petitions that the presiding official who heard their appeals erred in finding no procedural error in the agency's affecting their removal actions for pre-employment reasons through a supervising naval officer when an agency regulation required the Industrial Relations Department to be the effecting authority. The presiding official found that the appellants failed to prove that the agency had such a regulation, and the appellants have cited us to none in their petition for review. We find no error on the part of the presiding official in this regard. *See* 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(b)(1) and (c)(3).

Appellants Simmins and Brown have also asserted in their petitions that the presiding official who decided their appeals erred in not finding that the charges leveled against them were stale. Citing *Heffron v. United States*, 405 F.2d 1307, 1311 (Ct. Cl. 1969), they have argued that the fact that the agency waited some two years after they were employed, and more than four months after informing them that charges could be brought, before instituting a removal action for pre-employment reasons, constituted prejudicial delay. The presiding official noted that *Heffron* requires a showing of actual prejudice and concluded that Messrs. Simmins and Brown had failed to show prejudice to their rights or to their ability to defend themselves against the charge. Again, our review of the record discloses no error by the presiding official. *See id.*; *Simmonds Precision Products, Inc. v. United States*, 546 F.2d 886, 892 (Ct. Cl. 1976); *cf. National Labor Relations Board v. Florida Steel Corp.*, 586 F.2d 436, 442 (5th Cir. 1978).

Finally, all of the appellants have contended in their petitions that the presiding officials erred in finding that the removal actions were for such cause as will promote the efficiency of the service, as required by 5 U.S.C. § 7513(a). They have urged that the misstatements in their employment applications were not so material as to warrant removal, especially in light of the fact that the appellants have since learned to perform their trade very well and their former positions have been shown to be difficult to fill.

The presiding officials acknowledged in their initial decisions that the appellants established at the hearings that they were satisfactory employees and that the agency was having difficulty filling their former positions. Additionally, the presiding official who heard the appeals of Messrs. Simmins and Brown noted that the agency's schedule of disciplinary offenses and penalties[4] provided for a range of penalties from reprimand to removal for a first offense of "falsification, misstatement, or concealment of material fact in connection with any official record." The presiding officials both concluded, however, that the appellant's misrepresentations were so material that they would not have been hired if they had truthfully stated their lack of qualifications. Referring to *Rodriguez v. Seamans*, 463 F.2d 837, 843 (D.C. Cir.), *cert. dismissed*, 409 U.S. 1094 (1972), in support of their findings, the presiding officials held that the removal of the appellants does promote the efficiency of the service. We concur in this determination.

The discharge of an employee upon discovery of a falsification of information on an employment application is an accepted practice in private industry. *National Labor Relations Board v. Florida Steel Corp.*, 586 F.2d at 441; *Firestone Tire & Rubber Co. v. National Labor Relations Board*, 539 F.2d 1335, 1336 (4th Cir. 1976). Its application by the Federal Government has been affirmed by the courts as promoting the efficiency of the civil service. *Williams v. Boorstin*, No. 79-1684, slip op. at 17-18 (D.C. Cir. October 3, 1980); *Rodriguez*, 463 F.2d at 843.

Except for Mr. Brown, whose testimony was not found credible, all of the appellants admitted that they realized they were making false representations at the time they signed the application forms bearing the following warning: "A false answer to any question in this Statement may be grounds for not employing you, or for dismissing you after you begin work, and may be punishable by fine or imprisonment. . . ." As stated in *Rodriguez*, 463 F.2d at 842-43, falsification of records is "an act which goes to [an] appellant's reliability, veracity, trustworthiness, ethical conduct and certainly affects the efficiency of the service." *See also Williams* at 17-18.

The misrepresentations in the seven cases on appeal could not have been more material than falsely attributing to the appellants experience which would appear to qualify them for the positions they were seeking. *See Cadena v. Department of Justice*, 3 MSPB 390 (1980). The fact that they ultimately acquired the experience on the job does not diminish their culpability for the original misrepresentation. *Williams* at 9; *Rodriguez*, 463 F.2d at 842.

Accordingly, we hereby AFFIRM the initial decisions dated

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[4] This schedule was to have been submitted by the agency in connection with the appeals of the other five gentlemen, *see* Schwartz Hearing Transcript at 7, but it is not contained in the records for those appeals.

July 31, 1980, in the appeals of Messrs. Baker, Lincoln, Kerr, Washburn, Phelan, Simmins, and Brown.

This is the final decision of the Merit Systems Protection Board. The appellants are hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellants' receipt of this opinion and order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 4, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD F. BAUER
v.
DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL,
TOBACCO, AND FIREARMS

Docket No.
SF07528110007

ORDER

On December 4, 1980, the Bureau of Alcohol, Tobacco and Firearms (hereinafter "the Bureau"), filed a motion for an interlocutory appeal and stay of hearing in connection therewith. The motion asserts that the Board's presiding official assigned to this matter at the San Francisco Field Office has made certain improper or erroneous rulings in his conduct of the pre-hearing aspects of this case. For the reasons stated herein the motion is DENIED.

The Bureau challenges the merits of the presiding official's ruling on a motion to disqualify appellant's representative and his subsequent failure to certify an interlocutory appeal concerning that motion. Under the Board's regulations there is no direct appeal from such a denial of certification. These matters may properly be raised in a petition for review. 5 C.F.R. § 1201.93(b).

Furthermore, an additional reason exists for denying the Bureau's motion, in that 5 C.F.R. § 1201.93(a) requires that motions for certification be filed within five days of receipt of the presiding official's determination. That requirement was not met by the Bureau.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PAULINE J. BRINK
v.
U.S. VETERANS ADMINISTRATION

Docket No.
NY075299019

OPINION AND ORDER

Pauline J. Brink was removed from the position of Housekeeping Aid, Veterans Administration Medical Center, Bath, New York, effective February 18, 1979, based on charges of threatening her immediate supervisor and accepting a gift from a resident. Her past disciplinary record was also cited. In response to the agency's advance notice of proposed removal, Ms. Brink's representative recommended that a fitness for duty examination be conducted by the agency to determine whether she was qualified for mental disability retirement. The agency determined that no such examination was called for, and proceeded to remove her.

Ms. Brink filed an appeal, and following a hearing by the Board's presiding official, an initial decision was issued which reversed the agency's removal action, the presiding official having found that the agency committed harmful procedural error in removing respondent without first applying for disability retirement on her behalf. Such a finding was based upon the determination by the presiding official that the agency should have known that respondent's conduct may have had its causes in mental illness.

In its petition for review, the agency alleges that respondent's behavior was not such as to warrant a reasonable conclusion on the part of agency officials that Ms. Brink was laboring under a disability or that her actions were the result of mental illness. Furthermore, the agency requests that no reversal of the removal action be undertaken until the fact or absence of mental illness could be established by a psychiatric evaluation, which information would then constitute new and material evidence not available when the initial decision was issued.

We agree with the analysis of the presiding official that an agency is under an obligation to determine through the use of a fitness for duty examination whether an employee is totally disabled, and to apply on the employee's behalf for disability retirement if the employee is unable or unwilling to do so. *See Anderson v. Morgan*, 263 F.2d 903 (D.C. Cir. 1959). Yet a prerequisite for such an obligation is the reasonable belief on the part of the responsible agency officials that the employee may be totally disabled. We do not believe that the conduct of Ms. Brink, contrary to the findings of the presiding official, was such as to call forth such an initial obligation on the part of the agency.

The requirement for an agency-conducted fitness for duty examination is found at 5 C.F.R. 831.1203 which reads in pertinent part:

> (a) *Examination. When the agency has reason to believe an employee may be totally disabled within the meaning of paragraph (c)(1) of this section,* and satisfactory medical evidence is not otherwise available, the agency may direct the employee to report for an examination. However, in the case of an employee with a suspected mental or emotional illness when the examination being considered is psychiatric, two or three agency officials (including a manager or supervisor, a personnel official, and a medical officer if available) must agree, in the light of all available facts of the case, that such an examination appears to be necessary. . . . (emphasis supplied)
>
> and
>
> (c) *Disability standards.* An agency shall file an application for the disability retirement of an employee only when it certifies that:
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> (1) In its opinion the employee is totally disabled for useful and efficient service in the grade or class of position occupied (as shown by his performance or by a job related factor) because of disease or injury not due to vicious habits, intemperance, or wilfull misconduct on his part within 5 years before becoming so disabled. . . .

The above cited regulation pertinent to the agency's obligations to its employees clearly requires:

> (1) Actions on the part of the employee which give the appropriate agency officials reason to suspect that the employee may be laboring under a total disability;
>
> (2) That such employee actions are not attributable merely to "vicious habits, intemperance, or wilfull misconduct," but are capable of being reasonably attributed to mental disease or injury in the case of a mental disability; and
>
> (3) That great care must be taken by the agency only to require fitness for duty examinations in the case of suspected mental disability when "such an examination appears to be necessary."

It should be obvious that there is often a fine line between behavior which is simply "vicious" or "intemperate" and behavior which has its roots in mental disease or injury. Yet it is also obvious that the above cited regulation section has as its purpose the protection of the employee against unwarranted fitness for duty examinations or allegations of mental incompetence brought about by whim. Furthermore, while the actions of the employee may reveal much about the nature of his or her problems, and while agency officials are not permitted to ignore signs of mental or emotional troubles, it is axiomatic that even with due diligence agency officials are not required to maintain a detailed psychological history or profile on their employees.

Our focus, then, should not be upon what aspects of Ms. Brink's emotional history were brought to light for the first time at hearing, but rather upon what was known to her superiors at the agency and the reasonableness of their actions in light of that knowledge. As found by the presiding official relating to Ms. Brink over the year prior to her removal from the agency:

(1) Ms. Brink was temperamental, and responded to supervision negatively;

(2) Ms. Brink cursed quite a bit;

(3) Ms. Brink was not a part of the social group formed by her coworkers and remained an "outsider";

(4) Ms. Brink was disrespectful to, and cursed on occasion, supervisors, fellow workers, and patients; and

(5) Due to earlier incidents of disrespectful behavior, she was asked to meet with the Employee Assistance Committee (EAC) at the hospital but voluntarily removed herself from the program.

The presiding official, after reviewing the previous year's behavior pattern for respondent, then concluded that "while each of these above referenced instances would not, in and of itself, cause one to conclude that it was brought on by mental illness, I find that the pattern of behavior certainly would lead a reasonable person to conclude that at least there was a possibility of mental illness." Initial Decision at 8.

Even when seen in the light least favorable to respondent, it seems likely to us that her emotional outbursts and abusive language could be seen by a reasonable person in evaluating such behavior as a poor attitude coupled with a bad temper.

At this point, however, the presiding official departed from the realm of what was known, despite reasonable inquiries, to the proposing and deciding officials responsible for effectuating respondent's removal from the agency. Dr. McAllister, Chairman of the EAC, had numerous contacts with respondent and believed her to be guilty of overreaction, confused, distressed and angry. He attempted to refer her to outside professional consultation, but she refused. Despite inquiries to the Employee Assistance Committee from those officials responsible for eventually determining whether to remove respondent, Dr. McAllister's suspicions regarding possible emotional problems was never brought to the attention of the proper supervisory employees. Even assuming such information would have made a difference in the analysis by such individuals as to whether a fitness for duty examination was in order, the individuals who were required to make such a determination were not apprised of the information.

As noted *supra*, the focus of the Board's inquiry into the decision of the proper agency officials is not whether the Board is in possession of information which would lead a reasonable person to conclude that a possibility of total mental disability existed, but what reasonable conclusion would have been drawn based upon the facts known to the proper agency officials at the time when a decision had to be made. Using this standard, as dictated by regulation, we find that a reasonable person would have concluded that Ms. Brink's behavior was temperamental, but that such behavior was not based upon mental illness.[1]

Although not raised as a separate issue by respondent, and although not addressed by the presiding official, we find the record to contain sufficient allegations of mental disability to warrant our inquiry as to one further question. For even were the agency's removal of respondent in all other respects proper, had she made out a defense of a prohibited personnel practice, the agency action would have to be reversed. Under 5 U.S.C. 2302(b)(1)(D) an employee may not be discriminated against "on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791). . . ." Section 1613.704 of title 29 of the Code of Federal Regulations implementing the Act provides that:

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[1] Although not determinative of the outcome of this appeal, we note that respondent has been given two fitness for duty examinations by agency doctors since her removal. The first was performed by Dr. George Alikes, M.D., on February 21, 1979 in relation to respondent's own disability retirement application based on physical disorders. Dr. Alikes' findings are discussed in the presiding official's decision in the instant appeal. Initial Decision at 8-9. Dr. Alikes found that the respondent had "no limiting condition for this job."

A second fitness for duty examination was given by Dr. W. B. Rhee, a specialist in Psychiatry and Neurology, at the request of OPM. He found that respondent was emotionally stable and required no psychiatric treatment. The denial of respondent's disability retirement application is presently before us in Docket No. NY831L09009, and we take official notice of the facts of that case pursuant to 5 C.F.R. 1201.67.

> An agency shall make reasonable accommodation to the *known physical or mental limitations* of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program. (emphasis supplied)

Thus our analysis of whether a prohibited personnel practice has taken place, like our above analysis of disability retirement regulations, must lead to the same conclusion—that lack of knowledge on the part of the responsible agency officials of factors or events which would lead them to reasonably conclude that an employee is laboring under a mental impairment or handicapping condition would preclude meaningful agency obligations. Where the responsible agency officials have no knowledge of the handicap, or of factors from which the handicap might reasonably be inferred, there can be no accommodation. Likewise, there can be no basis for discrimination.

5 C.F.R. 1201.115 provides that a petition for review may be granted when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

The petition for review correctly points out that the initial decision of the presiding official is based upon the totality of information available to the Board at hearing, and not to the information upon which the proper agency officials had to rely when making their determination to remove respondent. As such the initial decision of the presiding official is based upon an erroneous interpretation of 5 C.F.R. 831.1203 as set forth above.

Finally, we note that the Board's presiding official rendered his initial decision without specifically ruling on the incidents related in his decision, his purpose being merely to state a "worst case analysis" to determine what agency officials must have believed concerning respondent's behavior. Initial Decision at 7-8. Furthermore, having found that a fitness for duty examination should have been ordered, and that the agency's failure to do so was harmful procedural error, the presiding official never reached the issues raised by respondent concerning disparity of treatment in the agency's meting out of penalties, and respondent's allegations concerning improper motivation by the agency in bringing the action which led to her removal.

For the above reasons, the agency's petition for review is GRANTED, the initial decision is VACATED, and the case is

REMANDED to the field office making the initial decision for further findings in light of this opinion.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN J. WARNER — Docket No. PH07528010060
ALBERT BETHEL — Docket No. PH07528010045
JAMES MCEWEN — Docket No. PH07528010044
v.
DEPARTMENT OF THE NAVY

OPINION AND ORDER

Appellants Warner, Bethel, and McEwen were removed from their positions as Insulation Workers at the agency's Philadelphia Naval Shipyard based on charges of falsifying their employment applications with regard to relevant prior experience qualifying them for their positions. The Board's Philadelphia Field Office sustained the three removal actions on appeal after affording appellants a consolidated hearing.[1] Appellants have petitioned for review of the initial decisions. We hereby GRANT the petitions for review and, because the issues raised in the petitions are identical, we hereby CONSOLIDATE the three appeals for purposes of review. 5 U.S.C. 7701(e), (f).

Appellants were part of a group of approximately 20 agency Insulation Workers who were removed for falsifying their qualifications in their applications for employment. Counsel for the three appellants stipulated at hearing that his clients falsified their prior experience as pipefitter insulators. Appellant Warner claimed that he had two years' previous employment as a pipecoverer and insulator, when in fact he had no such experience. Appellant Bethel had stated that he had approximately nine years' experience as a pipecover insulator when his actual experience consisted of an eight-day course in pipecovering work given by a local union. Appellant McEwen falsified that he had almost four years' experience as an insulator helper and insulator, when in reality he had only four months' experience in insulation work.

All of appellants have alleged in their petitions and briefs in support thereof that the presiding official erred in finding that the removal actions were for such cause as will promote the efficiency of the service, as required by 5 U.S.C. 7513(a). They have contended that the falsifications in their employment applications were not so material as to warrant removal, particularly as they have since learned the skills of their trade and their former positions have proven to be difficult for the agency to fill.

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[1] Although individual initial decisions were rendered, the appeals of Warner, Bethel, and McEwen were heard, and decided on identical grounds, by presiding official Roger A. Schwartz.

The agency stipulated and the presiding official acknowledged in his initial decisions that appellants established that they were satisfactory workers and their positions were difficult to fill. The presiding official concluded, however, that appellants' misrepresentations were so material that they would not have been hired had they truthfully represented their lack of qualifications. Therefore, the presiding official found that the agency's removal actions were taken for such cause as will promote the efficiency of the service. We agree with this determination.

The discharge of an employee upon discovery of a falsification of information on an employment application is an accepted practice in private industry. *National Labor Relations Board v. Florida Steel Corp.*, 586 F.2d 436, 441 (5th Cir. 1978); *Firestone Tire & Rubber Co. v. National Labor Relations Board*, 539 F.2d 1335, 1336 (4th Cir. 1976). Its application by the federal government has been affirmed by the courts as promoting the efficiency of the service. *Williams v. Boorstin*, No. 79-1684, slip. op. at 17-18 (D.C. Cir. October 3, 1980); *Rodriguez v. Seamans*, 463 F.2d 837, 842-43 (D.C. Cir.), *cert. dismissed*, 409 U.S. 1094 (1972).

Appellants stipulated that they knowingly falsified their employment applications. As the court stated in *Rodriguez, supra*, 463 F.2d at 842-43, falsification of records is "an act which goes to appellant's reliability, veracity, trustworthiness, ethical conduct and certainly affects the efficiency of the service." *See also Williams, supra*, at 17-18.

The misrepresentations in the three cases on appeal could not have been more material than by falsely attributing to appellants experience which would appear to qualify them for the positions they were seeking. *See Cadena v. Department of Justice*, 3 MSPB 390, 393 (1980). The fact that they ultimately acquired on the job experience and performed satisfactorily in their positions does not diminish their culpability for falsifying their qualifications for employment. *Williams, supra*, at 9; *Rodriguez, supra*, 463 F.2d at 842; *Cadena, supra*, 392.

Finally, appellants alleged in their briefs in support of their petitions for review that the presiding official erred in not finding that their removal constituted disparate treatment because other employees charged with falsification of their employment applications received lesser penalties. The presiding official found that the lesser penalties imposed were not material to these appeals because the false statements made by the other employees in those earlier cases pertained only to their non-employment related general character and suitability. It did not bear on their qualifications for the positions which they sought. We conclude that the record supports the findings of the presiding official that appellants failed to prove disparate treatment by the agency in arriving at its removal decisions. *See* 5 U.S.C. 7701(c)(2); 5 C.F.R. 1201.56(b).

Accordingly, we hereby AFFIRM the initial decisions of the presiding official in the cases of appellants Warner, Bethel, and McEwen.

This is the final order of the Merit Systems Protection Board. Appellants are hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EOLIS BILLINGSLEY
v.
U.S. POSTAL SERVICE

Docket No.
PH075209043

OPINION AND ORDER

The U.S. Postal Service, petitoner, demoted Eolis Billingsley, appellant, based on the charge that he failed to maintain a proper work schedule. Specifically, it was alleged that appellant failed to present acceptable medical evidence of his inability to work from June 25, 1979 to August 9, 1979. After a hearing, the action was reversed by the presiding official; the agency then petitioned the Board to review the initial decision.

The presiding official found that appellant had been in an approved leave status throughout the period of time cited by the agency. (Sick leave from June 25 to July 28 and leave without pay from that date until August 10.) The presiding official concluded that since appellant's absences had been approved, they were not a breach of his responsibility, and his demotion would not, therefore, promote the efficiency of the service.

Appellant reported that he was sick and unable to work on June 24, 25 and 26, 1979. He continued to be absent without calling his supervisor after that. On July 13, 1979, the agency sent him a letter requesting that he either report to work or submit medical justification for his absence. A July 18, 1979 note from appellant's doctor indicated that appellant was undergoing tests and therapy and probably would be able to return in two weeks. A further note dated July 25, indicated appellant might return in a week.

The Postal Service found the notes inadequate justification for appellant's absence, and by letter dated July 27, 1979, informed him that he would be carried in an absent without leave status pending submission of acceptable evidence. By letter of August 9, 1979, the doctor detailed appellant's health difficulties since June 25, and released appellant to return to work on August 10.

The letter proposing to demote appellant said that appellant's absence "from June 25 to August 10 is totally unacceptable. As a supervisor . . . (appellant) maintain(s) a critical position . . . (and) inability to report . . . or to keep the Postal Service (informed) of when you are able to report, places the operation in jeopardy." The letter indicated that the doctor's August 9 letter had been received, but there was no explanation as to the acceptability of the medical explanation.

Thus, it appears that there are issues of material fact as to appellant's absences—his efforts to inform the agency, and the sufficiency of the medical statements. These issues of fact were never resolved because the presiding official concluded that the agency had "failed to state a cause of action." He dispensed with the case, instead, by finding that the appellant was in a leave without pay status from July 28, to August 10, 1979, based on the testimony of appellant's supervisor. The Postal Service challenges this finding.

Since a presiding official acts as the Board's agent and has no independent statutory jurisdiction, 5 U.S.C. 7701, "this Board is free to substitute its own determinations of fact for those of the presiding official, giving the (initial) findings (such) weight as may be warranted by the record and . . . reasoning" of the presiding official. *Weaver v. Department of the Navy*, 2 MSPB 297, 298 (1980). The Board, however, respects the opportunity given the presiding official to observe the demeanor of those who testify. *Weaver, Id.*

In this case, the petition for review specifically identifies evidence not considered by the presiding official, as well as misinterpretation of evidence presented. The evidentiary question is sufficient to justify review of the initial decision to ascertain if the initial decision is based on an erroneous interpretation of the statutory requirements governing the weight of the evidence. *Weaver, Id.* at 299. Accordingly, the petition for review is granted.

While appellant's supervisor did state that appellant was in a LWOP status from July 28 to August 10 (hearing transcript, p. 17), he explained that appellant was actually in a without pay status (WOP), indicating that leave had not yet been approved (hearing transcript, p. 23). This explanation is corroborated by the July 27 letter to appellant, which said no leave would be approved until acceptable medical evidence was submitted. The statement is also corroborated by the "absence analysis" form submitted by the agency, which indicates appellant was carried in a WOP status. The appellant submitted no rebuttal evidence as to this factual issue. We accordingly find that the agency did not approve leave for the period July 28 to August 10, 1979.

This is not to say, however, that the action was proper. The factual issues noted above must be considered and resolved by the presiding official. The medical evidence presented to the agency must be evaluated, as well as the agency's refusal to accept such evidence and the effect of the agency's approval of appellant's absences until July 28. These factual questions should be considered first by the presiding official.

Accordingly, the initial decision is vacated, and the case is remanded for further consideration by the presiding official and the issuance of a new initial decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 8, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY R. HODNICK
v.
FEDERAL MEDIATION AND
CONCILIATION SERVICE

Docket No.
SF531D09004

OPINION AND ORDER

This appeal was reopened by order of the Merit Systems Protection Board dated January 18, 1980, for consideration of two issues of first impression: (1) whether an appellant may be a "prevailing party" for purposes of an attorney fee award under 5 U.S.C. 7701(g)(1) and (2) if the agency has voluntarily withdrawn the adverse action upon its own initiative; and (2) if such an appellant is deemed a "prevailing party," under what circumstances may an award of attorney fees be "warranted in the interest of justice" under 5 U.S.C. 7701(g)(1).[1] Briefs were submitted by Anthony R. Hodnick (the appellant), the Federal Mediation and Conciliation Service (the agency), and the Office of Personnel Management as intervenor. We have given full consideration to the various arguments raised in the briefs.

I. BACKGROUND

The appellant petitioned for review of the agency's reconsideration decision denying him a within-grade salary increase. After a hearing on the appeal was scheduled by the Board's San Francisco Field Office but before it was convened, the agency notified the Chief Appeals Officer in writing that it had decided to grant the appellant his within-grade increase because "procedural errors occurred during the within-grade determination process which may have been other than harmless."[2] In so doing, the agency emphasized that the error was strictly procedural; it maintained that the appellant's "performance during all revelant times was not at an acceptable level of competence to support the increase."

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[1] A full discussion of the types of circumstances under which an award would generally be "warranted in the interest of justice" was set forth in *Allen v. U.S. Postal Service*, 1 MSPB Docket 582, 591-594 (1980) which was decided after this appeal was reopened to treat that issue in the context of an appeal which was terminated prior to final decision. As the discussion *infra* makes clear, the same considerations apply.

[2] A copy of the official Notification of Personnel Action substantiating this grant of within-grade increase was enclosed with the agency's letter.

After the Chief Appeals Officer dismissed the appeal as moot by letter dated September 20, 1979, the appellant moved for an award of $375 in attorney fees. The agency opposed the motion. In an addendum decision dated October 30, 1979, the presiding official denied the award, finding that, in order for the appellant to be a "prevailing party" to whom fees could be awarded, a final decision must have been entered.

II. WHAT IS A "PREVAILING PARTY"?

Attorney fees may be awarded in cases not involving a finding of prohibited discrimination in accordance with 5 U.S.C. 7701 (g) (1):

> Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of *reasonable attorney fees* incurred by an employee or applicant for employment if the employee or applicant is the *prevailing party* and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is *warranted in the interest of justice,* including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit. (Emphasis added.)

In cases involving a finding of prohibited discrimination, on the other hand, attorney fees may be awarded in accordance with 5 U.S.C. 7701(g) (2):

> If an employee or applicant for employment is the *prevailing party* and the decision is based on a *finding of discrimination* prohibited under section 2320(b) (1) of this title, the payment of *attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964.* (42 U.S.C. 2000e-5(k)). (Emphasis added.)

In his addendum decision, the presiding official distinguished the "prevailing party" in discrimination cases from that in non-discrimination cases. Under the Civil Rights Act of 1964, he noted, a court may award fees to a "prevailing party" even though no final judgment has been entered. He found, however, that since the standard for the award of fees in discrimination cases was intended by Congress to differ from the standard for an award in non-discrimination cases, the "prevailing party" concept must also differ. He concluded, therefore, that the more restrictive interpretation of "prevailing party" for the award of court costs under Rule 54(d) of the Federal Rules of Civil Procedure[3] was applicable in appeals before the Board not involving a finding of discrimination.

We disagree. Such inconsistent interpretation of the same phrase within the same section of the Civil Service Reform Act conflicts with the general rule of statutory construction favoring consistent interpretation where the same legislative purpose applies, in the absence of clear intent to the contrary. *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978); *American Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1058 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

As noted by the presiding official, the language of 5 U.S.C. 7701(g) manifests the intent of Congress that the standards for the award of attorney fees differ in discrimination cases as opposed to non-discrimination cases—fees are to be awarded to the "prevailing party" in the former cases as a matter of course, except where special circumstances would render an award unjust, *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968),[4] but fees are to be awarded in the latter cases to the "prevailing party" only where warranted in the interest of justice, *Allen v. U.S. Postal Service*, 2 MSPB Docket 582, 587-594 (1980). *Compare* 5 U.S.C. 7701(g)(2) *with* 5 U.S.C. 7701(g)(1). The fact of these different standards for the award of fees has no bearing, however, on the meaning of the underlying "prevailing party" concept.

The agency has argued in its brief that, since subsection 7701(g)(2) provides for the award of fees where "the *decision* is based on a finding of discrimination . . .," (emphasis added) reading it together with subsection 7701(g)(1) would require that a final decision issue before fees may be awarded. We find this argument unpersuasive. Such an interpretation of the word "decision" would contravene the intent of Congress in enacting 5 U.S.C. 7701(g)(2) to provide appellants with the same reimbursement of attorney fees in administrative proceedings as would be available in civil proceedings, without having to bring a separate civil action to recover fees. *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 60-61.

Attorney fees may be awarded to the "prevailing party" under the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. 1988, without a final decision in the complainant's favor; the courts require only that the complainant obtain at least a significant portion of the relief sought in bringing the action, whether through settlement or otherwise. *E.g., Maher v. Gagne,* 48 U.S.L.W. 4891, 4893 (June 25, 1980); *Bonnes v. Long,* 599 F.2d 1316, 1318 (4th Cir. 1979); *Foster v. Boorstein,* 561 F.2d 340, 342 (D.C.Cir. 1977). If the respondent grants all or part of the relief sought before a judgment or another order is entered, fees may be awarded only if it is determined that relief was granted as a result of the institution of the action. *Foster v. Boorstein,* 561 F.2d at 343. The same "prevailing party" concept is applied in awarding attorney fees under the Freedom of Information Act, 5 U.S.C. 552 (a) (4) (E). *E.g., Cox v. U.S. Department of Justice,* 601 F.2d 1, 6 (D.C.Cir. 1979); *Nationwide Building Maintenance, Inc. v. Sampson,* 559 F.2d 704, 714 (D.C.Cir. 1977).

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[3] See, *e.g.*, *Mobile Power Enterprises, Inc. v. Power Vac, Inc.*, 496 F.2d 1311, 1312 (10th Cir. 1974).

[4] *See also Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 417 (1978); *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979).

We find that this "prevailing party" concept is equally applicable in awarding attorney fees under 5 U.S.C. 7701(g) (1) or (2). An appellant may be deemed a "prevailing party" for purposes of such an award if he or she has obtained all or a significant part of the relief sought in petitioning for appeal, regardless of whether a final decision has been issued. If a final decision ordering that relief has not been rendered by the Board, however, the relief obtained must be found to be causally related to the initiation of the appeal before fees may be awarded. Permitting an agency otherwise to avoid liability for fees merely by conceding an appeal before final decision would greatly diminish the purpose of the fee provision to ease the financial burden of bringing meritorious appeals. *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 60-61 (1978); *see also Foster v. Boorstein,* 561 F.2d at 342. It would also tend to discourage settlements, which would be contrary to the public policy favoring the speedy resolution of appeals to the Board. *See* 5 U.S.C. 7701(i) (1) and (4).

In this appeal we note that the appellant obtained the relief he sought in instituting these proceedings, namely, a within-grade salary increase. We note, further, that the agency granted the relief after the appeal was filed, having discovered procedural errors in its denial of the increase which may have been "harmful" and thus reversable. These circumstances lead us to conclude that the appellant is the "prevailing party," having obtained the desired relief as a result of petitioning for appeal.

III. IS AN AWARD "WARRANTED IN THE INTEREST OF JUSTICE"?

Attorney fees may be awarded to the prevailing party in a non-discrimination case[5] only if such award is "warranted in the interest of justice. . . ." 5 U.S.C. 7701(g)(1). The burden of establishing entitlement to an award under this standard rests with the appellant as the moving party. *Allen* at 594. Although that burden is especially difficult to meet in a case like this where the appellant has had no opportunity to develop evidence at a hearing before the presiding official, the burden must be met nonetheless.

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[5] Discrimination based on a handicapping condition was alleged in the petition for appeal. However, 5 U.S.C. 7701(g) (2) requires a "finding" of

In moving for an award of fees before the presiding official, the appellant offered no argument that an award was "warranted in the interest of justice," urging only that he is entitled to fees because he is the prevailing party. He repeated this faulty argument in the brief submitted to the Board in connection with our reopening of the appeal. Thus, unless the record contains convincing evidence bearing on this issue to the contrary, the appellant has failed to meet his burden.[6]

As noted above, the record reflects the agency's admission that "procedural errors occurred during the within-grade determination process which may have been other than harmless." The record contains, however, no evidence as to the nature of these errors upon which we could base a finding that they constituted gross procedural errors warranting an award of fees. *Allen* at 593. Since the record discloses no other aggravating circumstances tending to show that an award of attorney fees is "warranted in the interest of justice," *see Allen* at 592-594, we conclude that fees may not be awarded in this case.

IV. ORDER

Accordingly, the addendum dated October 30, 1979, is hereby VACATED and the motion for an award of fees is hereby DENIED based on the foregoing opinion.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *December 8, 1980*

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discrimination before fees may be awarded under the more liberal standard of 42 U.S.C. 2000e-5(k). We can make no such finding in this case because the record lacks any probative evidence bearing on that issue.

[6] Since appellant did not request a hearing on his motion for an award of fees, the evidentiary record before us is limited to that established before the appeal was dismissed.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID J. PAGE
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
SF831L09015

OPINION AND ORDER

Appellant's disability retirement application was denied by the Office of Personnel Management (OPM) on the basis that there was insufficient objective evidence to support a finding of permanent total disability. Appellant then filed an appeal with this Board under 5 U.S.C. 8347(d). The presiding official of the Board's San Francisco Field Office sustained OPM's decision to disallow appellant's application for disability retirement, based on his review of all of the evidence of record.

Appellant has now petitioned for review, alleging that (1) new and material evidence exists which was not available at the time the record was closed, and (2) that the initial decision was based upon an erroneous interpretation of 5 U.S.C. 8331(6).

5 U.S.C. 8331(6) sets forth the definitions of the terms "disabled" and "disability" for the purposes of Subchapter II of Chapter 83 of Title 5. Appellant's petition fails to demonstrate that the presiding official erroneously interpreted or applied that provision of the statute. Accordingly, the Board finds that a complete review of the record under 5 C.F.R. 1201.115(b) is not warranted.

Appellant's employing agency is the United States Postal Service. In his petition he alleged, as new evidence, that subsequent to the close of the record,

> . . . an arbitration hearing was held, the same being stage four of a grievance proceeding. The United States Post Office stipulated with the petitioner herein that the injury . . . was disabling from permitting petitioner to fulfill any of the craft positions of the Post Office.

The Board finds that this information, in and of itself, is insufficient to affect the correctness of the initial decision. The law is clear that an agency may find an employee too disabled to continue work, while OPM may determine that he does not qualify for disability retirement. *Polos v. United States*, 621 F.2d 385, 393 (Ct.Cl. 1980); *Piccone v. United States*, 407 F.2d 866, 872

(Ct.Cl. 1969). Thus the alleged stipulation fails to meet the Board's regulatory review criteria as new and material evidence under 5 C.F.R. 1201.115(a). However, this new information may provide appellant with the basis for filing a new application for disability retirement. Pursuant to 5 U.S.C. 8337, appellant's new application must be filed within 1 year of his separation from the service.

Accordingly, appellant's petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 8, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HARRY C. LANE v. DEPARTMENT OF AGRICULTURE	Docket No. AT075209128

OPINION AND ORDER

Appellant, a non-probationary competitive service employee, filed a petition for appeal requesting a hearing on the action of the Department of Agriculture reducing him in grade and pay as Plant Physiologist, GS-435-14 to GS-435-13. The action was effected by the reclassification of appellant's position after classification evaluation of his position based upon criteria set forth in the agency's Research Grade Evaluation Guide. Appellant was informed he was not entitled to grade and pay retention because the reclassification was based on his performance as a research scientist.

Without holding a hearing, the presiding official issued an initial decision in which he found that appellant's case was a classification appeal under 5 U.S.C. ch. 51 within the jurisdiction of the Office of Personnel Management (OPM), that appellant occupied a position subject to the grade and pay retention provisions of 5 U.S.C. ch. 53, subch. VI, and that under 5 U.S.C. 5366 the termination of his grade and pay retention benefits was properly appealable to OPM. Finding that neither the reclassification of appellant's position nor the agency's determination that appellant was not entitled to grade and pay retention were within the Board's appellate jurisdiction, the presiding official dismissed the appeal.

The agency timely filed a petition for review in which it asserted that its action constituted a demotion for personal cause based upon appellant's unsatisfactory performance in his position. The agency argued that its action was in effect a Chapter 43 (performance) or Chapter 75 (adverse action) proceeding under Title 5, U.S.C., which was taken "for cause." It contended that appellant has no entitlement to grade and pay retention since 5 U.S.C. 5362(d)(2) denies grade retention to an employee who is demoted for personal cause. The agency further stated that appellant's right of appeal is to the Board, not OPM, because appeals to OPM of the termination of grade and pay retention benefits are restricted under 5 U.S.C. 5366(a)(1) to instances where the employee declines an offer of a position the grade or pay of which is equal to or greater than his retained grade or pay. Appellant has not responded to the agency's petition for review, nor has OPM intervened.

The petition for review is GRANTED.

In *Atwell v. Department of the Army*, 3 MSPB 8 (1980), we held that employees whose positions are reclassified to a lower grade and who are eligible for and receive the grade and pay retention benefits of 5 U.S.C. 5362 and 5363 are precluded from bringing an adverse action appeal to the Board from either the reclassification of the position or the reduction in grade and/or pay. *Id.*, 12-13. Therefore, adverse action procedural requirements promulgated by OPM properly do not apply to actions which entitle an employee to grade retention. 5 C.F.R. 752.401(c)(2). Neither the regulation nor *Atwell*, however, excludes from adverse action appeal rights coverage a reclassification action without retained grade and/or pay.

The presiding official found that appellant occupied a position which was eligible for the grade and pay retention benefits of 5 U.S.C. ch. 53. *See* Initial Decision at 2. The agency, however, characterized its action taken under classification authority delegated by OPM as a demotion for personal cause so that appellant, despite being an otherwise eligible employee, was not entitled to retained grade and pay under 5 U.S.C. 5362(d)(2) and 5363(c)(3). *See* petition for review at 2-4. We find that because the reclassification was effected as a demotion for personal cause the grade and pay retention benefits provisions of 5 U.S.C. 5362 and 5363 are inapplicable.

The agency's demotion action constituted both an adverse action appealable to the Board and a reclassification action appealable to OPM. Appellant meets the criteria of an "employee" for purposes of adverse action appeal rights coverage under 5 U.S.C. 7511(a)(1)(A). The reclassification of this position for cause to a lower grade without retained grade and pay benefits constituted a reduction in grade and pay action under 5 U.S.C. 7512(3), (4) appealable to the Board under 5 U.S.C. 7513(d) and 7701. While the reclassification of appellant's position (that is, the propriety of his present grade level and job classification series) is properly appealable to OPM under 5 U.S.C. 5112(b), the reduction of his grade and pay constituted an adverse action taken for cause, which is appealable to the Board. The presiding official correctly dismissed the appeal as to the reclassification of appellant's position, but he erred in dismissing the appeal from the reduction in grade and pay.

Accordingly, the initial decision of the presiding official is

REVERSED in its finding that the agency's reduction in grade and pay action was not appealable to the Board, and VACATED in its decision that the appeal of the agency's reduction in grade and pay action be dismissed. The case is REMANDED to the presiding official for adjudication of whether the specifications on which the agency's reduction in grade and pay action was based are supported by a preponderance of the evidence and whether the action was taken for such cause as will promote the efficiency of the service.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *December 9, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THOMAS A. MCDONOUGH
v.
U.S. POSTAL SERVICE

Docket No.
BN075209016

OPINION AND ORDER

Appellant was removed from his position as Part-Time Flexible Distribution Clerk due to his extended absence without official leave. The presiding official of the Board's Boston Field Office affirmed the removal, and appellant petitioned for review.

The presiding official reviewed the agency's refusal to excuse the absence in question only to determine whether that refusal had been arbitrary, capricious, or unreasonable. We find that the presiding official thus misapplied the applicable standard of Board review, as every element of the agency's case must be proven by a preponderance of the evidence. *In re William F. Van Sciver*, 1 MSPB 194 (1979). Accordingly, the petition for review is GRANTED.

Upon review, we find that the agency acted properly in not excusing the absence in question, and that the charges are supported by a preponderance of the evidence. The charges were:

> Charge No. 1: You have been Absent Without Official Leave since January 17, 1979.
>
> Charge No. 2: You failed to respond to letter sent to you on March 5, 1979 requesting medical certification from your attending physician within five (5) days, covering absences from January 16, 1979 to March 5, 1979.

As to Charge No. 1, the presiding official found that none of the medical evidence before him covered the period of January 20 to March 5. The hearing was held October 12, 1979, and the presiding official had held the record open for one additional week in order to allow appellant to provide such evidence. Although medical certification for the period was not presented to the presiding official within the time allowed, it was submitted as alleged new evidence accompanying the petition for review.[1] We decline to consider Dr. Kreplick's insurance report which was forwarded along with the petition for review. The record shows that appellant and his representative did not write to Dr. Kreplick requesting such certification until December 6 and December 8, 1979, respectively. Accordingly, we find that appellant and his representative failed to exercise requisite due diligence in attempting to provide the evidence within the time allotted for that purpose by the presiding official, *i.e.*, October 13 through 19, 1979. Thus, the report fails to meet the regulatory criteria for consideration as new evidence. 5 C.F.R. 1201.115(a).

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[1] Dr. Kreplick's report of an accident on January 17, 1979, prepared for the Travelers Insurance Company.

As was stated above, the agency required appellant to produce medical certification for his extended absence within a 5-day period. Although appellant essentially questioned the reasonableness of that requirement, we find that the amount of time which he did take in effecting compliance was, in fact, unreasonable. (Dr. Kreplick's letter was received April 2, 1979, nearly a month after the agency's request.)

We agree with the presiding official's finding that appellant's public political activities during the period in question demonstrated that appellant was not so physically and/or mentally disabled as to be unable to properly request leave, or to timely respond to the Postmaster's letter of March 5, 1979.

Accordingly, we find that the reasons for the proposed removal as cited in Charges Nos. 1 and 2 are supported by a preponderance of the evidence, and are sustained. The presiding official properly concluded that appellant's removal was for such cause as will promote the efficiency of the service, and we so hold.

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order. This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 10, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CLINTON SMITH
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
DC831L09005

ORDER

This appeal is REOPENED and REMANDED.

The United States Court of Appeals for the District of Columbia Circuit remanded this case to the Merit Systems Protection Board with instructions to remand to the Office of Personnel Management for reconsideration of the disability retirement application of the appellant.

Accordingly, this case is REOPENED and REMANDED to the Office of Personnel Management.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 10, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EDWARD H. KOENIG
v.
OFFICE OF PERSONNEL
MANAGEMENT

Docket No.
DC531D09029

OPINION AND ORDER

On October 14, 1980, this Board issued an order granting appellant's petition for review, vacating the initial decision and dismissing appellant's appeal as being moot. In that opinion and order we stated:

> Appellant has not responded to OPM's motion to dismiss even though a copy of that motion was forwarded to him by the Secretary of the Board on August 28, 1980.

That statement was in error. Appellant has provided, pursuant to his request for reopening dated October 30, 1980, irrefutable evidence that he did in fact respond to OPM's motion to dismiss.[1] In light of this evidence and the fact that the Board did not consider appellant's response, appellant's motion to reopen this case is GRANTED.

The Board has reconsidered its action of October 14, 1980, granting appellant's petition for review, vacating the initial decision and dismissing the appeal as moot. Our reconsideration of the facts underlying this case and the arguments of the parties, reinforces our conclusion that our October 14, 1980, Opinion and Order was correct. OPM's August 16, 1980, action cancelling its denials of appellant's within-grade increase and retroactively granting the within-grade increase effective June 3, 1979, does render this appeal moot.

OPM's action was not voluntary and was taken pursuant to the direction of this Board in *Koenig v. Office of Personnel Management*, MSPB No. DC531D09032, in which our presiding official found that the appellant was entitled to his within-grade increase effective June 3, 1979. OPM had failed to establish that substantial evidence supported its determination that appellant had not been performing his duties at an acceptable level of competence. Thus, appellant has received the substantive relief he sought in both the instant case and in case number DC531D09032—a determination that he was entitled to his within-grade due June 3, 1979.

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[1] Appellant provided a copy of a "date-stamped" copy of his response. The date-stamp shows that the response was filed in the Board's Office of the Secretary on September 25, 1980. Through clerical error appellant's response was not included in MSPB's official file and was not considered by this Board prior to issuing its October 14, 1980, Opinion and Order.

With regard to appellant's concern relating to a possible award of attorney's fees incurred in connection with this appeal, 5 C.F.R. 1201.37(a)(2) provides that a request for attorney's fees shall be made by motion to the presiding official "within 10 days of final date of a decision under 1201.113 in favor of the appellant." Appellant may file such a motion with the presiding official in the instant case within 10 days of the date of this order. Appellant has, in substance, prevailed in the instant case since OPM has rescinded the negative ALOC determination made August 2, 1979. A decision as to whether attorney's fees should be awarded in the instant case is a decision to be made in the first instance by the presiding official.

Accordingly, the petition for review is GRANTED, the initial decision date June 11, 1980 is VACATED, and the appellant's appeal is dismissed as being moot. This is the final order of the Merit Systems Protection Board in this appeal.

The appellant is informed of his right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this Opinion and Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOE RAMOS
v.
FEDERAL AVIATION ADMINISTRATION

Docket No.
DA075209162

OPINION AND ORDER

Appellant was administratively reassigned from his position as an electronics technician in Harlingen, Texas, to a similar position at the same grade and pay in Carlsbad, New Mexico, effective May 20, 1979, subsequently extended to June 7, 1979. Upon appellant's failure to report to his new duty station, he was placed in the status of being absent without authorized leave (AWOL), and upon his continued failure to report to Carlsbad, was removed by the agency on January 26, 1980.

At his hearing before the Board's presiding official, appellant alleged that the reassignment leading to his refusal to report to Carlsbad was based upon reprisals amounting to prohibited personnel practices under 5 U.S.C. 2302, such reprisals being based upon his national origin (Mexican-American), as well as those discussed immediately below. The presiding official affirmed the agency's action.

In his petition for review, appellant's contentions center upon his filing of Unsatisfactory Condition Reports (UCR's) while at Harlingen. It is appellant's position that the reassignment was based in large measure upon the filing of such reports and was a reprisal for such activity. Appellant argues that although the presiding official addressed the filing of UCR's in the context of 5 U.S.C. 2302(b) (8) as the prohibited personnel practice of reprisal for "whistleblowing," the presiding official failed to consider the possibility of reprisals for the same activity in relation to 5 U.S.C. 2302(b) (9) or (b) (10), relating respectively to reprisals for the exercise of appeal rights and for actions not adversely affecting the employee or others.

Secondly, appellant argues in his petition for review that the decision of the presiding official erroneously interprets 5 U.S.C. 2302(b) (8) in that there was held to have been no substantiation by appellant that the conditions reported in the UCR's actually represented dangers to health or safety. The standard established for "whistleblowers" is not that they must prove actual danger, but only that they held a *reasonable belief* as to the existence of such danger or dangerous condition, argues appellant.

Although in general terms reassignment not involving a change in pay, grade, or competitive level is not appealable to the Merit Systems Protection Board, 5 C.F.R. 1201.3; *Hayes v. National Aeronautics and Space Administration*, 3 MSPB 1 (1980) the removal of an employee for cause upon his refusal to accept such reassignment requires the agency to establish by a preponderance of the evidence that the removal will promote the efficiency of the service, necessarily requiring that the agency must make out at least a prima facie case regarding the propriety of the reassignment by showing: a legitimate management purpose for the reassignment, that the employee was given adequate notice of the reassignment, and that the employee refused to accept reassignment. *Ketterer v. U.S. Department of Agriculture, Federal Crop Insurance Corporation*, 2 MSPB 459 (1980).

Appellant's allegation that the reassignment stemmed from, and was a reprisal for, the filing of unsatisfactory condition reports must thus be viewed from two standpoints: either as a possible prohibited personnel practice under 5 U.S.C. 2302, or as evidence offered to attempt to cast doubt on the legitimate management purpose stated by the agency as the basis for the reassignment. The burden of establishing the former is upon the employee, while the burden of establishing the existence of a bona fide management purpose for the reassignment by a preponderance of the evidence remains with the agency. 5 U.S.C. 7701(c)(2)(B), (c)(1)(B); 5 C.F.R. 1201.56(b)(2), (a)(ii); *Ketterer, supra*, 462.

The distinctions drawn above, as well as the distinctions drawn by appellant in his petition for review, are distinctions without a difference in the factual circumstances presented in this appeal. The agency established before the presiding official that the appellant was reassigned only after differences between himself, his coworkers, and his supervisors warranted such an action on the part of the agency. I.D. at 7-8. Furthermore, the filing of unsatisfactory condition reports could not have formed the basis for the agency's decision, as the decision by the agency to reassign appellant was made prior to appellant's filing of his first unsatisfactory condition report. Tr. 171, 137, 138, 230-45. It matters not at all how we characterize appellant's allegations of reprisal, as the factual foundation necessary to establish the act upon which the reprisal would be based is lacking. *In re Frazier, et al*, 1 MSPB 159 (1979), 179, 180-181, 186-189.

While the record clearly establishes that the agency's reassignment of appellant could not have been taken because of appellant's filing of UCR's, appellant's contention regarding the standard to be applied under 5 U.S.C. 2302(b)(8) is correct. The presiding official found that:

> Although appellant alleged that each of the reported conditions represented hazards to safety, *he did not present evidence that they represented* mismanagement, a substantial danger to health or safety, or any of the other activities specified in 5 U.S.C. 2302(b)(8) (emphasis supplied).

Initial decision at 13.

The "whistleblower" protection set forth at 5 U.S.C. 2302(b)(8) affords relief to those against whom reprisals have been taken for the disclosure of information the employee or applicant "reasonably believes evidences" the conditions set forth. Although the employee must establish his defense of reprisal, 5 U.S.C. 7701(c)(2)(B); 5 C.F.R. 1201.56(b)(2), he need not establish that the condition he reports *demonstrates* mismanagement, danger, or any of the situations set forth in the statute; he must only show that the reported condition was one which he reasonably believed to constitute one of the situations specified.[1] Such a showing may be made, of course, by establishing that mismanagement or danger existed and that such condition was known to and reported by the employee. The presiding official in this case, however, was incorrect in assuming that proof on appellant's part short of an actual demonstration of mismanagement or a dangerous condition could not be sufficient to meet the appellant's statutory burden.

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[1] The original version of S. 2640, the Senate Bill which was to become the Civil Service Reform Act, protected the employee against reprisals taken by virtue of public disclosure of a violation of law, rule, or regulation so long as the disclosure itself was not violative of law, rule, or regulation. The Committee on Governmental Affairs specifically broadened the whistleblower protection by including, *inter alia*, more categories of disclosures which were protected and by making the standard the employee's "reasonable belief" that the information disclosed represents one of the categories specified. With reference to public health or safety related disclosures, the Committee specifically expressed its intent that the protection extended only to disclosures of dangers which were both "substantial and specific." S. Rep. No. 95-969, 95th Cong. 2d Sess. 21. The "reasonable belief" standard is also applied to the private sector reporting of suspected violation of EEO laws and reprisals taken against the employee for such disclosures. *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980).

While the employee who alleges reprisal for "whistleblowing" as a defense to an adverse action in an appeal to this Board need not establish with certainty the mismanagement or danger arising from agency actions, as this may well be extremely difficult for an employee to do, the employee must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one which a reasonable person in the employee's position would believe to evidence mismanagement, danger, or any of the situations specified in 5 U.S.C. 2302(b)(8).

In the instant case, appellant has failed to present any evidence which would bring the reports he filed within the protection afforded by 5 U.S.C. 2302(b)(8), and there is thus no basis upon which to conclude that his alleged beliefs were reasonable.

The Board may grant review under 5 C.F.R. 1201.115 if it is established either that there is new and material evidence available which was not available when the record closed, or that the presiding official erred in an interpretation of statute or regulation. Although the presiding official erred in his interpretation of statute, as specified above, it is our decision that such error would in no way affect the outcome of the initial decision.

In light of the above, the appellant's petition for review is GRANTED, and the initial decision is AFFIRMED as modified herein.

This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *December 12, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Judy Barnett
v.
Veterans Administration

Docket No.
PH07528010101

Opinion and Order

Appellant appealed from an action by the Veterans Administration Medical Center, Salem, Virginia, which removed her from the position of Nursing Aide. The removal action was based upon the charge of unsatisfactory performance of assigned duties. Four disciplinary actions previously received by appellant were cited in support of the agency's choice of the penalty imposed.

In the initial decision, the presiding official found the agency's action supported by a preponderance of the evidence, and the removal action to be for such cause as would promote the efficiency of the service. See 5 U.S.C. 7701(c)(1); 7713(a).

Appellant filed a petition for review contending that the decision of the presiding official was based upon an erroneous interpretation of statute and regulation. Specifically, she alleged that the agency's removal action, based upon unacceptable performance of assigned duties, was not in compliance with the procedures set forth in 5 U.S.C., Chapter 43, and that the presiding official erroneously accepted into evidence supervisory notes, introduced by the agency as supporting documentation in the agency file, which were not kept pursuant to requirements set forth in 5 U.S.C. 552a.

Appellant's allegation that the agency's removal action was not in compliance with the procedures set forth in 5 U.S.C., Chapter 43 is of no moment. The Board has held in *Wells v. Harris*, 1 MSPB 199, 235 (1980), that an agency may pursue a performance based action under Chapter 75 of Title 5, United States Code, so long as the agency meets the preponderance of the evidence standard, the higher burden of proof, and the more difficult standard of demonstrating that the action will promote the efficiency of the service.[1]

We find that the presiding official properly accepted and considered the notes introduced by the agency as part of its submission to the Board. The record reveals that appellant does not deny the truth of the assertions within the notes, but merely challenges the agency's compliance with 5 U.S.C. 552a, in maintaining the notes. The Board will not consider the issue of the agency's compliance with the foregoing statute in light of the fact that 5 U.S.C. 552a(g)(1) grants appellant judicial recourse to resolve that issue, and also because the outcome of any such judicial proceedings would have no effect on the merits of the removal action presently before us.

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[1] The substantial evidence standard, the lesser burden of proof, is applicable in performance based actions pursuant to 5 U.S.C. 4301. See 5 U.S.C. 7701(c)(1)(A).

Thus, the Board finds that the regulatory criteria for review have not been met. See 5 C.F.R. 1201.115. Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE I. BERGMAN
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
DA531D09015

OPINION AND ORDER

Lawrence I. Bergman was denied a within-grade increase in salary by the Social Security Administration, Department of Health and Human Services, based on a determination that his performance failed to meet an acceptable level of competence. The agency, after reconsideration, reaffirmed the original negative ALOC determination. Mr. Bergman filed an appeal dated April 15, 1980, with the Dallas Field Office. The initial decision, issued after a hearing, reversed the agency action based on the finding of the presiding official that the agency had committed procedural error in not basing the original negative determination on Mr. Bergman's waiting period as defined at 5 C.F.R. 531.402, and that this procedural error was harmful.

The agency filed a petition for review alleging erroneous interpretation of regulations by the presiding official. In their petition they argue that 5 C.F.R. 531.407 does not specify that equal weight must be given to performance during the earlier and later portions of a waiting period; that an agency can place special emphasis on the later portion of a waiting period in deciding whether to grant an employee's within-grade increase, and that in this case the performance during the notice period was so unacceptable that it would outweigh any favorable performance earlier in the waiting period. A response to the petition for review was filed by Mr. Bergman's representative, Local No. 2505 of the American Federation of Government Employees, wherein they argue to the contrary and ask that the initial decision be sustained.

At the time of his appeal, Mr. Bergman was employed as a Social Insurance Representative, GS-10, step 1, and had been in that grade and step since January 14, 1979. The waiting period for advancement to step 2 was 52 calendar weeks of creditable service and Mr. Bergman was eligible for consideration for a within-grade increase as of January 13, 1980. 5 C.F.R. 531.403. From January 14, 1979 to September 30, 1979, he was in the

Office Claims Unit and received a highly favorable performance appraisal for this period. On October 1, 1980, he was transferred to the Teleclaims Unit. After Mr. Bergman had been in the Teleclaims Unit for one month, his new supervisor conducted a desk audit of his performance and determined that his work was not up to the standard within her unit. She then issued a memorandum dated November 6, 1979, notifying him that unless his work improved he would not be awarded the within-grade increase for which he would be eligible on January 13, 1980. Thereafter, by memorandum dated January 23, 1980, entitled "Decision to Withhold Within-Grade Increase," his supervisor informed Mr. Bergman that a recent desk audit showed that his "work failed to attain an acceptable level." The supervisor testified at the hearing that this statement was based on an audit of appellant's work that she had conducted from November 30, 1979 through December 15, 1979, and that she had not looked at his performance appraisals for the period ending September 30, 1979.

We find little difficulty in deciding this case. It is undisputed that no consideration was given to Mr. Bergman's performance during the first 37 weeks of his 52 week waiting period, and his appeal alleges this omission as a procedural error. Clearly, it is so. Regulation requires that the agency, in determining if employees are performing at an acceptable level of competence, base its determination on the employee's performance during the waiting period. 5 C.F.R. 531.407(c)(2)(iii). The agency is required to make its determination on the basis of the employee's work performance throughout the entire waiting period and any action or omission which significantly shortens the waiting period is contrary to the regulation.

We next consider whether this procedural error was harmful so as to preclude the Board from sustaining the agency decision. 5 U.S.C. 7701(c)(2)(A). By regulation appearing at 5 C.F.R. 1201.56(c)(3), the Board has defined "harmful error" as

> (e)rror by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

Mr. Bergman alleged harmful error in his appeal, and the record shows that the highly favorable appraisal received by him for eight and one-half months performance of his waiting period was totally ignored. The question, as succinctly stated in an earlier case, is whether it is within the range of appreciable probability that this omission had a harmful effect upon the decision of the agency. See *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980). The application of the harmful error standard is adequately outlined in the analysis and findings contained in the initial decision of the presiding official. We find no error in his conclusion that, under these circumstances, the failure to consider the 37 week highly favorable performance of Mr. Bergman during his 52 week waiting period, was harmful error.

Therefore, the agency's petition for review is DENIED.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this Order.

This is the final order of the Merit Systems Protection Board in this case. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113 (b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WALTER A. HOGAN
v.
U.S. DEPARTMENT OF THE AIR FORCE

Docket No.
DE035109004

OPINION AND ORDER

Appellant filed an appeal with the Denver Field Office of the Board on November 19, 1979 from the action of the Department of the Air Force, Langley Air Force Base, Virginia changing him to a lower grade through the reduction-in-force procedures. The action was taken due to a transfer of function and was to be effective January 13, 1980. The presiding official concluded that since the reduction in grade would not be effective until January 13, 1980, the appeal was premature and therefore not within the jurisdiction of the Board. Accordingly, the appeal was dismissed.

A petition for review may be granted by the Board when it is established that there is new and material evidence available which was unavailable when the record closed despite due diligence or that the presiding official misinterpreted the statute or regulation. 5 C.F.R. 1201.115.

The presiding official based the dismissal of this appeal on his interpretation of 5 C.F.R. 1201.22. This regulation provides that petitions for appeal must be filed with the Board anytime during the period beginning with the day after the effective date of the action being taken until not later than 20 days of the effective date.

The appellant in his petition for review does not assert that the presiding official erred in his interpretation of the regulation. He only alleges that this interpretation creates undue hardship and expense and that his appeal should have been considered when initially presented. In addition, the appellant does not present any new and material evidence which was not available when the record closed. Therefore, none of the criteria for review by the Board has been met.

The Board would like to note that the initial decision of the Field Office was issued without the office having formally notified the agency that an appeal had been filed. In the future, such formal notification should be made. However, as there was no error by the presiding official in his interpretation of the regulation and the issues have now become moot with the passage of the effective date, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby notified of his right to petition the United States Court of Claims or the United States Court of Appeals for the appropriate circuit to review the Board's decision within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 15, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Serafin T. Isip
v.
Department of the Navy

Docket No.
SF075209236

Opinion and Order

Appellant filed a *pro se* petition for appeal dated November 11, 1979, from the action of the Department of the Navy removing him from his position as Office Services Supervisor with the agency's Public Works Center, Subic Bay, Republic of the Philippines, effective October 26, 1979. Appellant was charged with theft of U.S. mails. The petition, which did not request a hearing, was not received by the San Francisco Field Office until January 25, 1980.

By letter dated February 6, 1980, the presiding official requested that appellant "provide full details and particulars as to why" the petition was not filed within 20 days of the effective date of the removal action. 5 C.F.R. 1201.22(b). Appellant did not respond to the presiding official's February 6, 1980 letter.

A subsequent submission from appellant dated March 12, 1980, was received by the Field Office addressing the merits of his appeal but not the issue of timeliness. By letter dated March 11, 1980, the presiding official informed the parties that the record would close on April 10, 1980. Appellant apparently received the February 6 and the March 11, 1980 letters on June 16, 1980. Appellant responded to these letters on June 26, 1980. Appellant's June 26, 1980 response was received by the Field Office on September 5, 1980.

On August 13, 1980, prior to receiving the June 26 submission, the presiding official, in his initial decision, dismissed the appeal for failure to show good cause for waiver of the time limit for filing the petition. 5 C.F.R. 1201.12.

Appellant's timely petition for review alleged that he did not receive the presiding official's request of February 6, 1980 that he show good cause for his untimely filing until June 16, 1980, and that he did not receive the initial decision dated August 13, 1980 until September 2, 1980. Appellant asserted that he timely mailed his petition for appeal but that it must have been delayed in the mails. The agency responded asserting that appellant had not explained why he was unable to timely file his petition for appeal and requested that the petition for review be denied.

Our review of the record forwarded from the Field Office discloses that the envelope in which appellant mailed his petition for appeal was postmarked November 14, 1979. That postmark date establishes the date the petition was filed. *See e.g., Beer v. Department of the Army*, 2 MSPB 226, 227 (1980); *Rodriquez v. Department of the Army*, 2 MSPB 156 (1980). The petition for appeal was, therefore, timely. The contrary conclusion of the presiding official was erroneous.

Accordingly, the petition for review is GRANTED, and the initial decision of the presiding official is VACATED in its findings of fact and REVERSED in its decision that the appeal be dismissed. The case is REMANDED to the Field Office for further proceedings.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 15, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT B. MACDONALD v. DEPARTMENT OF THE NAVY	Docket No. SF075209162

OPINION AND ORDER

Appellant was removed from his position of Police Officer (Instructor) for being in an unauthorized area and for carrying a concealed weapon. Basically, the appellant, while off duty, was found in the Pearl Harbor Naval Exchange after closing hours, and had with him a loaded firearm in a paper bag, all of which the agency contended was not compatible with his position as a law enforcement officer.

Appellant appealed to the Board's San Francisco Field Office. In the initial decision, the presiding official found the charge supported by the evidence, particularly in light of the stipulations at the hearing. The presiding official, after considering appellant's pleas in mitigation, concluded that appellant's removal would promote the efficiency of the service. Accordingly, the agency removal action was affirmed. The appellant then petitioned the Board for review of the initial decision.

In the petition appellant asserted in pertinent part, that there is insufficient nexus, that the actions of the agency were biased and that it failed to carry its burden of proof; and that he did not receive a full and fair hearing.

An agency effecting an action under 5 U.S.C. section 7513 has the burden to prove by a preponderance of the evidence that its action was taken for such cause as will promote the efficiency of the service. 5 U.S.C. sections 7701(c) (1) (B), 7513(a) ; 5 C.F.R. 1201.56(a) (1) (ii). A preponderance of the evidence is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 5 C.F.R. 1201.56(c) (2).

As noted above, the appellant admitted the charges. Further, the record demonstrates sufficient nexus between the removal for the conduct in question and the efficiency of the service. As a police officer responsible for junior police units in various schools and authorized to carry fire arms, it can hardly be challenged that an agency has the right to expect and hold its law enforcement personnel to a high standard of conduct. Appellant's position is sensitive in light of the Naval Base Police Department's mission at the miliary installation. The record supports a conclusion that appellant's conduct reflected poor judgment on his part, which could hamper his effectiveness on the job. In *McCray v. Department of the Army*, 1 MSPB 445, 445 (1980), the Board held ". . . when an employee is entrusted with a dangerous instrumentality such as a gun, off-duty incidents which reflect negatively on his judgment in using that weapon are relevant to job performance, and may form the basis for an adverse action."

Therefore, the Board finds, in the conduct of appellant's "indiscretions", that the charges are connected with the performance of his duties so as to be viewed as having a nexus. *See Grebosz v. U.S. Civil Service Commission*, 472 F.Supp. 1081 (D.C. N.Y. 1979); *Yacovone v. Bailor*, 470 F.Supp. 777 (D.C. D.C. 1979).

With regard to the hearing, the Board does not agree that appellant did not receive a full and fair hearing. A review of the hearing transcript reveals that appellant had sufficient opportunity to explore the principle of like penalties for like offenses. Hearing Transcript, pp. 73-75, 152. In this connection we note that the agency furnished appellant with a list of disciplinary actions that had been imposed in the last 2-3 years. Thus appellant was not denied information to challenge his removal on the basis of disparate treatment. Moreover, the Naval Investigative Service report was part of the record and available for his review. Since appellant was removed for being in an unauthorized area and carrying a concealed weapon, any hint or inference of criminality in this report does not warrant a finding of bias by the agency, nor has the appellant shown any prejudice by use of the report.

Under the circumstances, the Board finds that the presiding official conducted the hearing in an appropriate manner. Further, we find that the petition fails to show error by the presiding official in exercising the authority provided him under 5 C.F.R. 1201.41. Accordingly there is no basis to reopen this case on this issue.

Finally, the Board concludes that the petition for review fails to demonstrate error in the presiding official's finding that the removal action was taken for the promotion of the efficiency of the service. The presiding official considered appellant's arguments in mitigation but found them unconvincing. Considering the nature of the offenses and the appellant's position of trust within the agency, we find no error in this regard.

We have carefully examined all other issues raised in the petition for review, and find that none meets the criteria set forth in 5 C.F.R. 1201.115. Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 15, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOHN J. OPET
v.
DEPARTMENT OF LABOR

Docket No.
PH075209122

OPINION AND ORDER

This appeal was filed with the Philadelphia Field Office of the Merit Systems Protection Board, based upon appellant's objection to the disallowance of compensation benefits by the Department of Labor. The presiding official dismissed the appeal, concluding that the matter was not within the jurisdiction of the Board.

The initial decision of April 8, 1980, specified that it would become "a final decision of the Merit Systems Protection Board on May 13, 1980 unless a petition for review is filed with the Board . . . no later than the date set forth above." Appellant's petition for review was dated September 9, 1980, and received by the Board on September 15, 1980.

The time limit for filing a petition for review is not absolute, however, because 5 C.F.R. 1201.113 allows for extension of time for "good cause shown." In the instant case, the Board granted appellant 20 days to submit written argument that there was good cause for the untimely filing of his petition for review. As of the date of this order, the Board has not received a response.

Since appellant submitted no reason for his failure to submit a timely petition, and as there is none apparent in the record, there is no basis upon which to find good cause for extending the time limit. Accordingly, the petition for review is DISMISSED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BUFORD DUNN
v.
DEPARTMENT OF THE ARMY

Docket No.
AT075209195

OPINION AND ORDER

The Board, having fully considered appellant's petition for review of the addendum decision decided on August 14, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

Appellant, a Warehouse Foreman with the Department of the Army, Lexington-Bluegrass Depot Activity, Lexington, Kentucky, was demoted to the position of Supply Clerk, GS-5, for unsatisfactory performance. He appealed the action to the Board. During the hearing on the appeal, the presiding official questioned the agency representative about the agency's initial presentation of certain evidence to support its action. After being informed that this evidence should have been submitted as part of the agency's record presented to the Board, the agency decided to cancel the action. The presiding official thus found that there was no longer any controversy to adjudicate and dismissed the appeal. Appellant then sought reimbursement for attorney fees under the provisions of C.F.R. 1201.37. The presiding official found that the appellant had failed to show that he was entitled to attorney fees in the interest of justice and denied the petition.

Appellant, in his petition for review, has contended that the presiding official erroneously interpreted 5 U.S.C. 7701(g)(1), which allows for the award of attorney fees only when warranted in the interest of justice. He has argued that, on the facts shown in the record, the agency was "at least guilty of gross procedural error by not providing the appellant and the Board with copies of the evidence it intended to use against him"; and thus, he was entitled to attorney fees in the interest of justice. Appellant has argued that this failure by the agency hampered him in his defense and left him without any protection against any future agency efforts to downgrade him.

The presiding official, in his addendum decision on the request for attorney fees, reasoned that "a 'gross procedural error' is, by definition, one which is synonymous with the term 'harmful error' " as defined by 5 C.F.R. 1201.56(b). Initial Decision at 4. Under 5 C.F.R. 1201.56(b), an employee must show that an agency error "caused substantial harm or prejudice to his/her rights" before the error will be determined harmful. Applying this criterion to appellant's circumstances, the presiding official found that appellant had not established substantial harm or prejudice since he had retained his position. Therefore, the presiding official concluded that the appellant had failed to show a "gross procedural error" entitling him to an award of attorney fees. *See Allen v. United States Postal Service,* 2 MSPB 582 (1980).

In *Allen, supra,* 590, the Board said that "gross procedural error" is an error which "prolonged the proceeding or "severely prejudiced" the employee, but it is not simply harmful error. Although the presiding official was incorrect in equating "gross procedural error" with "harmful error", we find that his denial of attorney fees was proper because no evidence has been presented in either the initial request for fees or in the petition for review to show that the proceeding was prolonged or that appellant was severely prejudiced. When the agency action was cancelled, appellant was restored to his prior position with back pay and the proceedings were terminated. On these facts, appellant has failed to show how the award of attorney fees would be warranted in the interest of justice.

Accordingly, the case is REOPENED and the initial decision AFFIRMED as modified herein.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 16, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WALTER E. GILDERSLEEVE
v.
U.S. POSTAL SERVICE

Docket No.
SF075209237

OPINION AND ORDER

This case concerns the agency removal for cause of appellant based on his failure to meet essential attendance requirements. After a hearing at which the appellant was represented by a union official, the presiding official affirmed the removal as supported by the preponderance of the evidence.

Appellant, in his petition for review, contends that he was not properly represented by the union representative and that he was not given an adequate opportunity to defend himself because a key witness was not given notice to appear.

Appellant's contentions are without merit. Appellant was advised that he was entitled to select an attorney or other representative to represent him in the appeal. Still, he voluntarily selected the union official. He cannot now avoid the consequences of his choice. *Link v. Wabash Railroad Company*, 370 U.S. 626, 632, 82 S. Ct. 1386, 1390 (1962). Similarly, the Board's Field Office advised appellant as to the proper procedure for subpoenaing a witness which appellant did not follow. In any event, appellant was not prejudiced since the presiding official subsequently allowed a written statement into evidence.

Accordingly, the petition for review is DENIED.

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 16, 1980*

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UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THEODORE W. HAYES v. TENNESSEE VALLEY AUTHORITY	Docket No. AT075209153

OPINION AND ORDER

This appeal is before us upon petition for review of an order of the presiding official affirming the agency's suspension of appellant for 30 days after holding that the efficiency of the service would be promoted by the suspension. The basis of appellant's petition is that the agency's charges sustained by the Board were not supported by the preponderance of the evidence in that the findings of the presiding official were clearly erroneous because he improperly gave weight to the testimony of witnesses other than appellant. In his petition, appellant also contended that the sexually oriented conduct charged did not constitute harassment or discrimination on the basis of sex.

I

Appellant, a grade M-5 Supervisor at the Watts Bar Nuclear Plant of the Tennessee Valley Authority (TVA), Knoxville, Tennessee, was suspended from December 5, 1979, to January 3, 1980, based on charges of conduct constituting sexual harassment of subordinate female employees in violation of TVA's equal employment opportunity (EEO) policy, and the misuse of government property. These charges were made by the TVA as a result of an agency investigation of charges of sexual harassment which were filed by certain female employees of the Watts Bar facility. Specifically, appellant was charged with:

> (1) Creating the appearance of using TVA time and property in the appellant's position as a supervisor to pursue a personal relationship with a female subordinate employee . . .;
>
> (2) Misusing government property and time by taking Ms. X[1] (a female subordinate employee) on tours of the plant at least six times in a TVA vehicle and on TVA time although she had no responsibility or duty requiring her to be in the field;

---

[1] Name of employee withheld in order to protect her privacy.

(3) Making continual suggestive remarks to TVA female employees Ms. X and Kim Robbins without directly proposing sexual activities;

(4) Rubbing the back and neck of Ms. X; and

(5) Showing Ms. X a picture of the body of a naked woman attached to a picture of her head from a photograph previously taken by the appellant.

Appellant timely appealed his suspension to the Board and denied the charges.

After a three-day evidentiary hearing, the presiding official upheld all of the charges as established by the preponderance of the evidence, except for the fourth charge of "rubbing the back and neck of Ms. X." The presiding official further held that, based on the sustained charges, appellant's conduct constituted sexual harassment in violation of the agency's EEO regulations. He concluded that the efficiency of the service was promoted by appellant's suspension.

In bringing his appeal, appellant had alleged that the agency's suspension action was the result of discrimination against him because of his race (white) and sex (male). As to that claim, the presiding official found that appellant's contention that the agency's EEO investigation was based on insufficient facts was not true since the agency charges were supported by the preponderance of the evidence.

II

Although, in reviewing the initial decision, the Board may substitute its own determinations of fact for those of the presiding official, it must depend heavily upon his assessment of witness credibility since it is the presiding official who was present to hear and observe the demeanor of the witness. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

Here, the initial decision, made after taking evidence consisting of 647 transcript pages and exhibits, shows that the presiding official carefully considered all of the testimony, including that of appellant, in determining whether the preponderance of the evidence supported the charges. In ruling on the weight to be given individual testimony, he carefully considered all factors going to the credibility of each witness, including those of the agency.

Appellant's contention that his testimony in general was improperly discredited by the presiding official, in that appellant admitted from the beginning showing Ms. X, a subordinate female employee, the sexually suggestive picture (App. Pet., pp. 1-2) is hardly persuasive that we should not give the findings of the presiding official due deference, much less that the charges are not supported by the preponderance of the evidence. Rather, his contention relying on his own admission only further supports the presiding official's finding that the appellant engaged in the conduct charged in the third and fifth specifications. Appellant's other contentions regarding the presiding official's credibility determinations are similarly unpersuasive and must be rejected under 5 C.F.R. 1201.115.

Appellant also challenged the presiding official's holding that appellant's behavior as represented by the sustained charges, particularly the fifth charge concerning the naked female incident, constituted sexual harassment or sexual discrimination as clearly erroneous in interpreting the law and evidence. (App. Pet. at p. 5).

The presiding official found that besides giving preferential treatment to a subordinate female employee with whom he pursued a personal relationship, appellant engaged in a pattern of conduct of making sexually oriented remarks to subordinate female employees, including the time that, without her knowledge, he took Ms. X picture at a Christmas party and had a cut-out of her face pasted on a nude centerfold picture. The presiding official also found that appellant had made sexually suggestive remarks on three other occasions. The first was when he told Ms. X that the time had come to "make his move" when they were both sitting in a parked vehicle after her employment interview. The second time was when appellant gave both Ms. X and another female employee, Ms. Robbins, tee shirts with the imprinted words "Nuclear Power—safer than sex."

Although appellant was not specifically charged with discriminatory sexual harassment, we note that such continuing conduct on the part of the appellant, even to the extent of showing a nude centerfold-type picture with the head of a subordinate female employee attached to the reproduction of the body, without her permission, may be analyzed in that context. Even though the presiding official did not conclude that employment opportunities were conditioned on acquiescence to advances or sexual propositions (in fact, Ms. X was employed notwithstanding having, according to her testimony, rejected the appellant's advances), such an inference might have been drawn because sexually oriented conduct directed at female employees, particularly of an abusive nature, is tolerated by them in most cases only in order to keep their jobs. Thus, acquiescence to such behavior often constitutes a term or condition of employment even if in an individual instance the supervisory employee does not retaliate against an employee who fails to reciprocate his advances.

We are aware that most cases brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, alleging sexual harassment or discrimination have involved situations where a female employee was in some way retaliated against for refusing to reciprocate a supervisor's advances. *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), where the plaintiff alleged that her job was abolished because she refused her male supervisor's sexual advances. It has also been held that to make a sex discrimination claim under Title VII, a female employee must show that her "employment was in fact conditioned on acquiescence to romantic advances." *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

However, what is involved in this case is more than simply a proposition made to a subordinate female employee by her supervisor on a single isolated incident. Rather, there is here a course of abusive and offensive behavior which, if directed in large part to female employees, is discriminatory.

Thus, the Equal Employment Opportunity Commission, in line with case law. has promulgated guidelines on sex discrimination which provide that sexually oriented conduct constitutes sex discrimination, whether verbal or physical, where it "has the purpose or effect of substantially interferring with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 C.F.R. 1604.11(a).

Similarly, in *Brown v. City of Guthrie*, 22 FEP cases 1627 (W.D. Okla. 1980), the court found that a supervisor's practice of continually directly sexually oriented comments and other nonverbal conduct to a subordinate female employee, which became so unbearable that she felt forced to resign, constituted sexual harassment and discrimination. *See Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 924-936 (D. N.J. 1978), where the court held that the creation of an indecent cartoon, which humiliated the plaintiff as a woman, was unlawfully discriminatory.

Appellant also contended that, based on his corroborated testimony, Ms. X appeared pleased with the naked caricature and thus it was not discrimination. That contention must be rejected for, as the presiding official found, even if true, her laughter may have only been a means of disguising deeper feelings of humiliation which, if uncovered, may well have exposed her to more ridicule. She testified that she reacted with feelings of humiliation and embarrassment. Also, in that the conduct was that of her supervisor—appellant—it was inherently coercive. She testified that she would have complained sooner had she not feared losing her job. It can hardly be said that she consented to the caricature when it was made without her knowledge. The fact that she allowed her picture to be taken for another purpose does not give rise to the inference, implied by appellant, that she knew all along what he was going to do with it.

As offensive as it was by itself, that incident was only part of the continuing conduct of appellant towards subordinate female employees which, according to Ms. X, culminated in a nervous condition requiring hospitalization.

In *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1979), the Fifth Circuit said that "employees' psychological as well as economic fringes [that is, fringe benefits] are statutorily entitled to protection from employer abuse." We believe that the agency also has an interest in maintaining a working environment that is free from supervisory abuse and harassment of employees based on their sex.

Inasmuch as the presiding official's findings that appellant's sexually suggestive conduct toward subordinate female employees had a detrimental effect on the efficiency of the service in a variety of ways, including the misuse of government time and property as well as the likelihood of causing feelings of humiliation and embarrassment on the part of subordinate employees, are more than amply supported by the evidence, the holding for the agency applied the correct statutory standard.

III

Accordingly, the petition for review of the initial decision is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 16, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES K. LOCKWOOD
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. PH075299050

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on August 1, 1979 and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

In its response to the petition for review, the agency admits that the physician who conducted a fitness-for-duty examination of appellant, at the agency's request, reported that appellant should be retired as disabled rather than removed. However, the appellant (who is represented by counsel) has not raised this matter, and has consistently maintained that he was not disabled. Since the record remains undeveloped in this respect, we need not address further the propriety of the agency's proceeding with the removal. *Cf. Calvin J. Hill v. U.S. Postal Service*, 4 MSPB 44 (1980). We note, for appellant's benefit, that 5 U.S.C. 8337(b) allows a waiver of the time limitation for filing a voluntary disability retirement application under circumstances which, according to the fitness-for-duty report referred to by the agency, may be applicable here.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 16, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROY PETRANEK v. DEPARTMENT OF THE ARMY	Docket No. CH035109017

OPINION AND ORDER

Pursuant to a reduction-in-force (RIF) action, appellant, a former Repair Parts Specialist, WG-8, was offered assignment to the position of Supply Technician, GS-6, which appellant accepted. Thereafter, the agency, upon learning of the availability of the position of Automotive Mechanic, WG-8, which it determined to be a better position, amended its offer to reassignment to that position.

Appellant accepted the offer for the automotive mechanic position but appealed the agency's action to the Chicago Field Office of the Board, alleging: (1) that the supply technician position was the better position because he was more qualified for that position; (2) that the agency violated RIF regulations by failing to offer him the best possible position; and (3) that, upon his acceptance of the first offer, a binding agreement was created between himself and the agency.

The agency contended, however, that the automotive position was the better position since appellant would have incurred no loss in pay or status and that, consistent with RIF regulations, it therefore made the best possible offer to appellant. The presiding official, finding that the agency had proved by a preponderance of the evidence that its action in offering the automotive position to appellant was proper, affirmed the RIF action.

In his petition for review, appellant, in addition to reiterating the contentions raised below, contended that the presiding official erred in denying him the opportunity to present his entire case and in refusing to permit him to submit a post-hearing brief. Appellant also asserted that certain statements he made characterizing the hearing as "unfair," because of the presiding official's ruling disallowing the brief, were omitted from the transcript of the proceeding.

Appellant contended strenuously, both on appeal and on review, that the automotive position was not the best position since he was more qualified for the supply position. Under 5 C.F.R. 351.703, appellant was entitled to the best available position. That section, however, does not determine the quality of the offered position by the qualifications required by that position. Instead, it merely requires that the offered position involve "no reduction, or the least possible reduction, in the representative rate. . . ." Since appellant was reassigned to another WG-8 position with no loss in pay or status, the requirement of that section was satisfied.[1] Although it has been held that the determination as to the qualifications for a position is a matter within the discretion of the agency (*See Miatech v. United States*, 213 Ct. Cl. 688, 689 (1977)), such determination is subject to review by the Board under 5 C.F.R. Part 351. *See Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980). Under 5 C.F.R. 351.702, the agency may waive the qualifications for a position upon its determination that the employee meets the "minimum educational requirements for the position" and "has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position." We find that the agency's determination that appellant's reassignment to the automotive position would not have been unduly disruptive or adverse to its operation is supported by the preponderance of the record evidence.

We concur with the finding of the presiding official that the agency's offer to appellant was not intended to be binding upon acceptance. Indeed, as the presiding official noted, appellant and a co-worker testified that they were orally informed by the agency that there could possibly be other offers. (Initial Decision, 2). Since a RIF action may often involve continuing changes in the agency's organization and, thus, in the kind and number of available positions, it would be unreasonable to conclude that an offer made under these circumstances is binding on the agency in view of the agency's obligation, under 5 C.F.R. Part 351, to assign the employee to the best available position.

A careful scrutiny of appellant's remaining contentions reveals that they are without merit. The record does not support appellant's allegation that the presiding official prevented him from presenting a complete case. Rather, the record demonstrates that the testimony appellant's representative sought to elicit was, as the presiding official determined, background information which was not relevant to the issue of whether the agency violated RIF regulations in its reassignment of appellant. (Tr., 31-34).

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[1] Also, appellant had complained of the exchange in reassignment of positions between employees D. D. Danford and W. L. Smith. Since appellant was not adversely affected by that exchange, he had no standing to complain thereof.

As to the presiding official's refusal to allow submission of post-hearing briefs, appellant had no statutory or regulatory right to submit a brief. The presiding official, noting the time constraints in processing the appeal and the fact that appellant was afforded ample time to prepare for the hearing, properly exercised his discretion, under 5 C.F.R. 1201.41, in finding that the brief was unnecessary. (Tr., 74, 75-76). The allegation that certain statements made by appellant concerning his objection to the presiding official's order were omitted from the transcript is also without merit since appellant's objection is reflected in the record. (Tr., 74, 75).

Accordingly, the petition fails to meet the criteria for review set forth at 5 C.F.R. 1201.115 and is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 16, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BETTE L. CONNORS
v.
DEPARTMENT OF THE ARMY

Docket No.
AT075209270

OPINION AND ORDER

Appellant was demoted from her position as Secretary-Stenographer, GS-5, Step 6, to that of Clerk-Stenographer, GS-4, Step 1, subject to upward retroactive adjustment. She was ultimately placed at GS-4, Step 4. The personnel action was initiated by appellant in order that she might accompany her husband, who had been transferred from New Orleans, Louisiana, to Fort Knox, Kentucky.

She appealed to the Board's Atlanta Field Office, alleging that she should have been placed at Step 8 rather than Step 4 of Grade 4. No hearing was conducted. The presiding official found that appellant had voluntarily accepted the demotion and that thus, no adverse action had occurred. Accordingly, he dismissed the appeal.

Appellant, through counsel, has petitioned this Board for a review of that jurisdictional determination. Counsel asserts that the agency misled appellant, to her detriment, as to her appeal rights and right to counsel. He indicates that appellant's consequent waiver of her right to a hearing had been inadvertent, and requests that the Board remand the case for a hearing.

A non-probationary, competitive service employee, such as appellant, has a statutory right to appeal a downgrade to the Board and to obtain a hearing upon request. 5 U.S.C. 7512(3); 5 U.S.C. 7513(d); 5 U.S.C. 7701(a)(1). Accordingly, when the Board's appellate authority is invoked by non-frivolous allegations which, if true, would establish that an adverse action by the agency has occurred, we will assume jurisdiction and grant a request for a hearing. *See Beatrice R. Spiegel v. Department of the Army*, 2 MSPB 307 (1980) and cases cited therein. Thus, we have carefully examined the record in order to determine whether there is a material issue of fact as to the voluntariness of appellant's demotion to GS-4, Step 4. The record reveals no such issue of fact sufficient to bring this case within the Board's appellate jurisdiction.

We find unsupported the statement in the petition that:

> Connors was assured that upon verification of previous employment, she would possess the grade and step level [GS-4, Step 8] that she possessed immediately prior to her promotion to the Grade 5 position. . . .

The presiding official noted appellant's own statement to the contrary:

> She was told she would have to accept employment at the GS-4, Step 1 level with the probability that her salary would be retroactively adjusted to the GS-4, Step 4 level upon verification of her previous employment.

Appellant may have had a reasonable belief that verification of her records would result in her being placed at Step 8 rather than Step 4. However, duress (or deceit) is not measured by an employee's subjective evaluation of a situation. Rather, the test is an objective one. *See Christie v. United States*, 518 F.2d 584, 587 (Ct.Cl. 1975), and cases cited therein. The presiding official found no evidence of agency deceit or duress relating to appellant's acceptance of the demotion. We find that the record supports the presiding official's conclusion that appellant was fully informed of the conditions of her employment at Fort Knox, and that she had voluntarily accepted those conditions.

Appellant has raised no meritorious allegations which, if true, would tend to establish that she had been involuntarily demoted. Thus she has failed to meet her burden of proof as to the issue of jurisdiction. 5 C.F.R. 1201.56(a)(2).

Furthermore, we find that the alleged new evidence referred to in the petition tends to demonstrate that the agency's internal regulation governing its determination of appellant's step level is ambiguously stated. The interpretation and application of that regulation took place subsequent to appellant's acceptance of employment at Fort Knox, and is not material as to the issue of jurisdiction.

The Board, having fully considered appellant's petition for review of the initial decision issued on August 14, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ARMOND D. SMITH
v.
DEFENSE LOGISTICS AGENCY

Docket No.
CH075209212

OPINION AND ORDER

Appellant petitioned the Board's Chicago Field Office for appeal of his removal as a janitor with the Defense Construction Supply Center, based on the agency's charge that appellant had pushed and struck his team leader, causing him physical injuries. A hearing was held in which appellant alleged that the agency's charge was not supported by the evidence.

In the initial decision the presiding official found that the agency had supported its action by a preponderance of the evidence and sustained the removal action as having been for such cause as would promote the efficiency of the service.

The appellant's petition for review disputed the presiding official's conclusions and asserted that new and material evidence was available. The agency responded that the appellant's petition for review did not meet the criteria for review under 5 C.F.R. 1201.115.

The petition for review constituted an attack on the determinations of credibility and findings of fact made by the presiding official. However, the appellant has submitted no evidence to show error in the presiding official's determination and such arguments do not meet the criteria for review. *See Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

Further, the appellant argued that there was no testimony offered by the agency that the appellant's alleged conduct impacted on the efficiency of the service. It has been held that "typical of conduct, which carries on its face prejudice to the service . . . [is] assault on one's supervisor at work." *Phillips v. Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978).

The appellant also stated that his representative failed to point out that the appellant's team leader was a much larger man than the appellant, and offered to provide additional testimony which he characterized as new and material evidence. According to the appellant this testimony was not presented at the hearing because his representative determined otherwise. The appellant did not assert that the evidence concerning either matter was not available

when the record was closed. Therefore the appellant has faile
meet the regulatory requirement for review. 5 C.F.R. 1201.115

Therefore, the petition for review does not meet the crit
for review under 5 C.F.R. 1201.115 and we find no basis for
agreement with the presiding official's initial decision.

Accordingly, the petition for review is DENIED. This is
final order of the Merit Systems Protection Board in this app
The initial decision shall become final five days from the dat
this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial rev
of the Board's action as specified in 5 U.S.C. 7703. A petition
judicial review must be filed in the appropriate court no later t
thirty (30) days after appellant's receipt of this Order.

For the Board:

ROBERT E. TAYLOR,
Secretar

Washington, D.C., *December 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES WILLIAMS, SR.
v.
U.S. DEPARTMENT OF THE NAVY

Docket No.
AT075209131

OPINION AND ORDER

Petitioner was removed from his position with the Marine Corps Logistics Base, Department of the Navy, for the alleged theft of government property. An appeal from the removal action was filed with the Atlanta Field Office of the Board, and a hearing on the matter was scheduled for March 25, 1980. Prior to the hearing, petitioner was convicted of theft arising out of the same alleged offense for which he was removed and was sentenced to serve six months in prison, such service commencing on March 21, 1980.

By motion received by the Field Office on March 14, 1980, petitioner's representative requested a continuance of the hearing pending the outcome of petitioner's appeal from the conviction. The presiding official, while agreeing that justice would not have been served by proceeding with the hearing while petitioner was incarcerated, was unpersuaded that justice required that the hearing be postponed until final disposition of the criminal appeal. Accordingly, he dismissed the appeal without prejudice, granting petitioner leave to re-file the appeal within 20 days after his release from prison.

On review, petitioner contended that the presiding official erred in dismissing his appeal in lieu of granting a continuance until his criminal appeal had been decided.

The agency responded to the petition as well as cross-petitioned for review, contending that the presiding official erred in dismissing the appeal without prejudice and that the hearing should have been held as scheduled. The agency specifically alleged that: (1) the affidavit submitted by petitioner in support of the motion did not comply with the requirement of 5 C.F.R. 1201.51 in that it failed to show good cause for the continuance; (2) that the presiding official ruled on the motion without affording the agency an opportunity to respond thereto; and (3) that the continuance until petitioner was released from prison placed an unfair burden on the agency whose witnesses are subject to momentary transfers.

With respect to petitioner's contention, his request for a continuance was tantamount to a request for extension of time under 5 C.F.R. 1201.55. Under that section, such requests are granted only on a showing of good cause. Evidence that petitioner would have been incarcerated during the hearing on the removal action constituted good cause for the granting of the continuance pending petitioner's release. However, as the presiding official found, good cause did not exist to hold the Board appeal in abeyance pending the outcome of the criminal appeal. Understandably, petitioner is concerned with any prejudicial effect his conviction might have on his Board appeal. Indeed, we held in *Chisholm v. Defense Logistics Agency*, 3 MSPB 273 (1980) that where a criminal conviction and the agency's charge arose out of the same offense, the doctrine of collateral estoppel may be applicable to proceedings before the Board. However, mindful of Congressional mandate that cases before the Board be expeditiously adjudicated, we find that refusal of the presiding official to grant a continuance pending the outcome of the criminal appeal was not improper. *Cf. Hersman v. National Science Foundation*, 2 MSPB 132 (1980).

We disagree with the agency's first allegation that petitioner's affidavit in support of his motion for continuance failed to demonstrate good cause. The affidavit stated that petitioner was convicted and sentenced to six months' service beginning March 21, 1980. Also submitted with the motion were copies of the indictment and the Judgment and Commitment Order. Since petitioner would have been incarcerated during the time of the hearing, and since his incarceration was for a relatively short duration, dismissal of the appeal without prejudice was not error. *See Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978).

In regard to the agency's second allegation, all parties to an appeal before the Board are entitled to an opportunity to object to a motion. *See* 5 C.F.R. 1201.55(b). However, 5 C.F.R. 1201.12 authorizes the Board to waive, upon a showing of good cause, a regulation not required by statute. In the instant case, petitioner was convicted on March 6, 1980, and was scheduled to commence serving his six-month sentence on March 21, 1980. The request for continuance was received by the Board on March 14, 1980. Because of the imminence of petitioner's date of incarceration and the March 25, 1980 hearing, time was of the essence in the rendering of a decision on the request for continuance. Under the circumstances, we find that good cause existed for a waiver of 5 C.F.R. 1201.55(b), and, therefore, the presiding official was not bound to permit the agency an opportunity to object to the request for a continuance. While to have done so may have been the better course, we cannot find that the presiding official's action was error.

The agency's final allegation, that dismissal of the appeal without prejudice was detrimental to its case, is unpersuasive. Although, concededly, military officers are subject to transfers upon short notice, the officers here concerned are under the agency's control and can therefore be produced, with minimal difficulty, to testify on its behalf. In the alternative, depositions or affidavits of those officers could easily be obtained and utilized. The Board's regulations at 5 C.F.R. 1201.71-1201.85 provide the mechanism to avoid such prejudice as the agency alleged.

For the foregoing reasons, both the petition and the cross-petition fail to meet the criteria for review set forth at 5 C.F.R. 1201.115.

Accordingly, both the petition for review and the cross-petition for review are DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the United States Court of Appeals or the United States Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 17, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES O. MATTHEWS, JR.
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
AT083109004

OPINION AND ORDER

Appellant, an optionally retired employee under 5 U.S.C. § 8336(a), filed a request with the Office of Personnel Management (OPM) that his "separation by retirement be considered involuntary." Appellant sought the change to enable him to allegedly earn social security coverage for subsequent temporary appointments with the federal government. Appellant had retired as Supervisory Personnel Staffing Specialist, GS-12, on February 28, 1976. He had been employed by the former Civil Service Commission (CSC), Mobile, Alabama, area office. Appellant submitted copies of CSC documents and correspondence to OPM which evidenced that the CSC announced the consolidation of the agency's Mobile and Huntsville, Alabama, offices in November 1975 to be completed by July 1976. The exhibits indicated that the agency knew in November 1975, after counseling all the employees of the Mobile area office concerning their desire to continue employment in view of the consolidation announcement, that appellant planned to remain with the Mobile area office as long as possible and then retire rather than relocate. Appellant thereafter retired effective February 28, 1976, before the CSC issued formal written notice in March 1976 to the employees of the Mobile area office that their positions would be relocated. Appellant's retirement was accomplished as an optional retirement.

On May 16, 1979, appellant requested OPM action to show that his retirement was involuntary rather than voluntary. OPM denied appellant's request on the basis that he had elected to retire before the issuance of the formal notice of the transfer of function in March 1976.[1] Upon request for reconsideration, OPM affirmed its

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[1] OPM's petition for review cited FPM Supp. 831-1, subch. S11-2(b) (May 31, 1979), as forming the basis for its decision that appellant's separation was voluntary. However, it is the FPM provisions which were effective at the time of appellant's separation which must constitute the rationale for OPM's decision. Then effective FPM Supp. 831-1, subch. S11-2(c) (December 16, 1974), provided in pertinent part:

c. Resignation in lieu of involuntary separation. If an employee, after decision that appellant was not eligible for discontinued service retirement.

Appellant filed a timely, *pro se* petition for appeal from OPM's reconsideration decision with the Atlanta Field Office of this Board pursuant to 5 U.S.C. § 8347(d). Appellant requested that his retirement be changed to involuntary and waived his right to a hearing.

By certified letter dated May 6, 1980, the presiding official informed OPM's Associate Director for Compensation, Retirement, and Insurance Programs of the appeal and enclosed a copy of appellant's petition. The presiding official requested that OPM furnish the agency's records of the case and any response to the presiding official within 15 days of receipt of the letter. The letter also informed OPM that "[f]ailure to defend the appeal in a timely manner may result in a ruling for the appellant." OPM received the letter on May 8, 1980, but did not respond.

On June 3, 1980, the presiding official sent a "SECOND REQUEST," also by certified mail, to OPM's Associate Director for Compensation. The second notice informed OPM that the case would "be decided without the agency's submissions unless your response to our previous request is mailed to this office by June 16, 1980." The presiding official reminded OPM "that under the Board's regulations, the failure of a party to defend an appeal may result in a ruling for the appellant." OPM received the second notice on June 6, 1980, but did not respond in a timely manner.

On June 26, 1980, the presiding official issued her initial decision, noting that as of that date she had still not received OPM's reconsideration file or any other information from OPM. Based upon the submissions of appellant and OPM's failure to defend the appeal, the presiding official concluded that the preponderance of the evidence supported "appellant's claim that his retirement was erroneously recorded as voluntary." The presiding official reversed OPM's reconsideration decision and under authority of 5 U.S.C. § 1205(a)(2) ordered OPM to amend the SF-50 form documenting appellant's retirement to reflect that his retirement was involuntary.

On June 27, the day after issuance of the initial decision, OPM submitted its response and reconsideration file to the presiding

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receiving notice that he will be separated . . . resigns before the scheduled separation date, his separation is involuntary. If the notice contains an offer—in lieu of separation—of promotion, reassignment, or demotion to another available position, the employee's resignation in lieu of accepting the other position also constitutes an involuntary separation. If, however, the employee resigns before receiving official separation notice or after he enters on duty in the new position, the separation is voluntary.

official. The presiding official declined to accept OPM's evidence as untimely submitted after issuance of the initial decision.

OPM has now filed a timely petition for review by this Board. In its petition, OPM states that it does "not disagree with the statement of facts made in the Field Office decision" but asserts that the initial decision incorrectly concluded that appellant's separation was involuntary for retirement purposes under 5 U.S.C. § 8336(d)(2).[2]

OPM bases its assertion on FPM Supp. 831-1, subch. S11-2, interpreting the statute as requiring an employee to receive written notice that he or she faces involuntary separation as of some specific date because of coming organizational changes before his or her resignation may be accepted as involuntary and qualifying for discontinued service retirement. OPM asserts that appellant did not establish that he received specific written notice of the transfer of his function as did the other employees in his office and that his election to retire must be considered voluntary.

Finally, OPM asserts that the presiding official exceeded her authority to order corrective action under 5 U.S.C. § 1205(a)(2) allegedly because in "retirement appeals, only the appellant and the Compensation Group" of OPM "are parties before the Board," and it is OPM as the employing agency, not the Compensation Group in OPM, which has the authority to amend an employee's SF-50 form in his or her personnel records.

We do not here make any determination as to the binding effect of the FPM Supplement provisions generally. However, OPM's myopic construction of the FPM Supplement provision to require, without exception, a specific written notice of involuntary separation before an employee may qualify for a discontinued service retirement must be rejected. Not only did OPM fail to raise this or any other issue before the presiding official, but OPM also ignores its own language in former FPM Supp. 831-1, subch. S11-2(a) (December 16, 1974). Subchapter S11-2(a) set the tone for the entire section on involuntary separation for discontinued service retirement purposes and provided, in pertinent part:

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[2] 5 U.S.C. § 8336(d) provides:

An employee who is separated from the service—

> (1) involuntarily, except by removal for cause on charges of misconduct or delinquency; or
>
> (2) voluntarily, during a period when the agency in which the employee is serving is undergoing a major reorganization, a major reduction in force, or a major transfer of function, as determined by the Office of Personnel Management, and the employee is serving in a geographic area designated by the Office;

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

> a. Definition of term. The term *involuntary separation* means any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency. Examples are: Reduction in force; abolishment of position; lack of funds; expiration of term of office; liquidation of an office or of an entire agency; inefficiency (unless due to the employee's misconduct); disability (provided the separation action is initiated by the agency); separation during probation because of failure to qualify; or separation of an indefinite or temporary employee under the Commission's instructions for displacement (section 316.801 of the regulations). *Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used.* . . . (Emphasis supplied.)

The Court of Claims has also held under this provision that it is the true substance of an action which determines whether a separation is voluntary or not for discontinued service retirement purposes. A separation is involuntary if the separation is against the will and without the consent of the employee. *See Patterson v. United States*, 436 F.2d 438, 439-41 (Ct. Cl. 1971); *Browning v. United States*, 373 F.2d 915, 918-19 (Ct. Cl. 1967).

We agree with the undisputed findings of the presiding official that appellant's evidence established that the CSC in effect formally communicated to him the impending transfer of his function. We find additionally upon examination of the true substance of this case that appellant's separation was involuntary within the meaning of FPM Supp. 831-1, subch. S11-2(a)(c) (December 16, 1974). Appellant was, therefore, eligible for a discontinued service retirement. We further find that the presiding official properly invoked 5 C.F.R. § 1201.43(b) in ruling for appellant, in part, as a sanction due to OPM's complete failure to defend the appeal by timely responding to the presiding official's two requests for information. By failing to exercise the due diligence expected of any agency in defending an appeal before this Board, OPM will not now be heard to complain that the presiding official found on the facts before her that appellant's separation was involuntary. *Cf. Roberts v. Defense Logistics Agency*, 4 MSPB 56 (1980); *Jackson v. Postal Service*, 4 MSPB 31 (1980); *Mosses v. Postal Service*, 2 MSPB 193 (1980).

OPM argues, finally, that its "Compensation Group" which represented OPM in this appeal is authorized to amend only retirement records and not personnel records as appellant's former employing agency. Thus, OPM's "Compensattion Group" asserts that it cannot obey the presiding official's order that OPM amend the SF-50 form documenting appellant's retirement to reflect that it was involuntary. The argument posited by OPM is without merit. Under 5 U.S.C. § 8347(d), it is an administrative action or order of OPM affecting the civil service retirement rights or interests of an individual or the United States which may be appealed to this Board. Although OPM's "Compensation Group" may represent the agency in these appeals, the actual party is OPM.

In accordance with our statutory directive under 5 U.S.C. § 1205(a)(1) and (2), to hear and adjudicate all matters within our jurisdiction and order any agency to comply with our order or decisions, our procedural regulations adopted under authority of 5 U.S.C. § 1205(g) and § 7701(j) provide that a "party" in a case over which we exercise jurisdiction means "[a]n individual, agency, intervenor, the Office of Personnel Management, or the Special Counsel who is participating in an adjudication before the Board." 5 C.F.R. § 1201.4(f). Contrary to the "Compensation Group's" assertion, the actual participant in the adjudication of this appeal is OPM and the presiding official did not exceed her authority under 5 U.S.C. § 1205(a)(2) and 5 C.F.R. § 1201.111 (b)(2) in ordering OPM to amend its personnel records to reflect that appellant's retirement was involuntary. Where this Board orders an agency to cancel an improper personnel action or to take any action which is necessary to give effect to a Board decision, we do not interfere with the delegations of authority which may have been established within a particular agency to effect our decision. *See Meier v. Department of the Interior*, 3 MSPB 341, 348 (1980). OPM, thus, may not complain that it cannot comply with the presiding official's order because its "Compensation Group" is without authority to amend appellant's form SF-50 in OPM's personnel records.

We believe, however, that the relief ordered by the presiding official was not sufficiently complete to effect a final disposition of the case. Appellant established that his separation was involuntary and, therefore, his retirement was not optional. Appellant should have been granted a discontinued service retirement under 5 U.S.C. 8336(d) as the appropriate relief to reflect fully the involuntariness of his separation.

Accordingly, OPM's petition for review of the initial decision issued on June 26, 1980, is DENIED. Under authority of 5 U.S.C. § 7701(e)(1)(B) and 5 C.F.R. § 1201.117 the initial decision is REOPENED and RECONSIDERED by the Board on our own motion, and OPM is ORDERED to take such action as is necessary to grant appellant a disconsinued service retirement. As MODIFIED, the initial decision is AFFIRMED.

OPM is hereby ORDERED to furnish evidence of compliance with this final order to the Field Office within ten (10) days of the date of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EMITE BUCHANAN
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
SF831L9011

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on June 12, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The initial decision affirmed the Office of Personnel Management's (O.P.M.'s) denial of appellant's application for disability retirement. However, that denial by OPM was based solely on its finding that appellant's application was untimely filed.

The petition for review argues that even though appellant's application would have otherwise been untimely, appellant had been "mentally incompetent" within the meaning of 5 U.S.C. sec. 8337(b) for the intervening five years between his removal from the federal service and the date of his application for disability retirement, and that therefore his application to OPM should be deemed timely filed. The evidence of record before the Board shows that appellant never raised his incompetency claim to OPM. Therefore, there has been no decision by OPM on this issue which the Board can review. This claim might, however, present independent grounds for a request by appellant that OPM reopen the matter.

At the hearing conducted at the Board's field office, appellant's presentation of evidence related solely to his physical condition at the time his federal employment ended. He did not seek to raise the incompetency issue to the Board. In his petition for review, appellant had made no showing why such evidence could not, with due diligence, have been submitted prior to the closing of the record. *See Beer v. Department of the Army*, 2 MSPB 226 (1980). Nor does the evidence presented with the petition explain appellant's failure to submit such evidence earlier.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LARRY E. DENSON
v.
UNITED STATES POSTAL SERVICE

Docket No.
AT300A09006

OPINION AND ORDER

Appellant was terminated prior to completion of his second 90-day appointment to the position of Mail Handler with the United States Postal Office at Jacksonville, Florida. He thereafter applied for the position of City carrier but was denied employment on the ground that he was medically unqualified for that position. Appellant appealed the denial of employment to the Atlanta Field Office of the Board which dismissed the appeal for lack of jurisdiction.

In his petition for review, appellant contended that the presiding official erred in finding that the Board lacked jurisdiction over his appeal. Specifically, appellant maintained that he was a preference eligible who had completed a probationary period with the agency and that he therefore had a right of appeal to the Board. Appellant further stated that the agency refused to employ him because he was a disabled veteran. Hence, we understand appellant to be contending that the agency discriminated against him because of his disability.

Under 5 U.S.C. 7511(a)(1)(B), a preference eligible in the United States Post Office has a right of appeal to the Board only upon completion of "1 year of current continuous service in the same or similar position." The record shows that appellant had not served continuously for a period of one year. Moreover, denial of employment is not an action "appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701. Because the agency's action is not appealable to the Board, the Board lacks jurisdiction to entertain the issue of discrimination raised herein. *See Smith v. Department of Health, Education, and Welfare*, 3 MSPB 3 (1980).

Accordingly, the petition fails to meet the criteria for review set forth at 5 C.F.R. 1201.115 and is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM D. HINES
v.
TENNESSEE VALLEY AUTHORITY

Docket No.
AT075209256

OPINION AND ORDER

The appellant, William D. Hines, petitioned the Atlanta Field Office of the Merit Systems Protection Board for appeal of his removal from the position of Asbestos Worker Improver Apprentice with the Tennessee Valley Authority, based on charges of sleeping on the job and being away from his assigned work area. In an initial decision dated July 21, 1980, the presiding official observed that the appellant's notice of removal informed him of the deadline for filing an appeal to the Board, and that the appellant failed to respond to the presiding official's letter affording him the opportunity to show good cause for filing after that deadline. In light of these circumstances, the presiding official dismissed the appeal as untimely filed.

In the petition for review, the appellant's attorney contended that the appellant did not fully comprehend the deadline requirement and that the appellant, who had been acting *pro se*, was confused by two letters from the presiding official received on the same day, one indicating that the appellant had to justify his late filing and the other stating that the appeal had been received and was being processed. In an affidavit attached to the petition, the appellant explained that he had assumed from the second of the two letters that his appeal was going to be considered. He explained, further, that the delay in filing his petition for appeal was caused by his working odd jobs to support himself while seeking to gather information pertinent to his appeal.

We believe that the two letters from the presiding official to the appellant, both of which are in the record, could indeed be confusing to someone lacking familiarity with legal procedures. If the appellant actually had good cause for filing his appeal after the regulatory deadline, the two confusing letters might justify the appellant's failure to respond to the presiding official's letter permitting a showing of good cause. Here, however, the appellant's explanation for missing the deadline, *viz.*, that he was working odd jobs while seeking to gather information, does not constitute good cause for filing his petition for appeal beyond the deadline. Thus, even if the appellant had responded promptly to the presiding official's show-cause letter, there was no good cause for waiving the filing deadline. *See* 5 C.F.R. 1201.12 and 1201.22(b).

Accordingly, the petition for review is hereby GRANTED and the initial decision dated July 21, 1980, is AFFIRMED.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *December 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HELENE T. MORROW
v.
DEPARTMENT OF THE ARMY

Docket No.
DA075209245

OPINION AND ORDER

Appellant was changed to lower grade from the position of Librarian, GS-11, to the position of Management Assistant, GS-5. The agency took the position that the appellant had voluntarily accepted the demotion, and did not utilize adverse action procedures.

She appealed, claiming that the downgrade had been involuntary. The presiding official of the Board's Dallas Field Office conducted a hearing on the issue of voluntariness. He concluded that appellant had voluntarily accepted the downgrade and that no adverse action had occurred. He then dismissed the appeal. Appellant petitioned this Board for review, alleging that the presiding official had erroneously interpreted and applied pertinent law. The petition is GRANTED. 5 C.F.R. 1201.115(b).

Because of her extensive use of approved sick leave, appellant was ordered to undergo a fitness-for-duty examination. She was examined by a private doctor, Dr. Harle, who forwarded his report to Dr. Ghidoni of the agency. On the basis of Dr. Harle's report, Dr. Ghidoni recommended that the agency "(t)ake action to separate . . ." her from employment.

The agency then called appellant in to discuss the situation and presented her with two options. She could accept demotion to a GS-5 position or she could apply for disability retirement. If she chose neither of those options, the agency informed her that it would apply for disability retirement on her behalf. Finally, she was informed that she was to be placed on sick leave and not allowed to return to her position as Librarian.[1] When she subsequently reported ready, willing, and able to work at the Library, she was told that if she did not leave, the MPs would escort her away. (H. T., 117, 118, 122.)

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[1] The record indicates that appellant had no accumulated sick leave at the time, and was therefore actually placed in a leave-without-pay status. The agency considered that fact "irrelevant" to the issue of the voluntariness of her decision. (H. T. at 139.)

We have carefully considered Dr. Harle's report, as well as the reports of the specialists who had examined appellant at his request.[2] The reports indicate that appellant is obese, has a "mild" knee problem which causes her some discomfort, and also suffers from gastroenterological irregularities. None of the reports state that she is unable to perform her duties. They do state that she might benefit from a change in jobs. All of the reports also contain discussions of emotional or environmental stress. Dr. Stool noted that:

> (t)here also appears to be an underlying emotional problem related to job dissatisfaction.

Dr. Chumley stated that:

> (s)he remained relatively asymptomatic until July of 1979 at which time she acquired a new supervisor at work. The patient does not get along with him at all. She feels threatened and is under a great deal of stress.

Dr. Chumley:

> agree(d) fully that change of jobs is indicated to one that is more compatible with the patient's personality.

Dr. Harle recommended that:

> the patient would benefit from (a change from) the present job to one of less emotional stress and one that would perhaps diminish the possibility of climbing stairs or squatting.

At the meeting called to discuss appellant's situation and "options":

> Ms. Morrow was advised of the necessity, based on the determination of the Occupational Health Officer (Dr. Ghidoni), that she be placed on sick leave pending adjutication (sic) of the disability retirement matter.[3]

Appellant testified that she was also informed at that meeting that it would be four to six months before she would receive her first retirement check. (H. T. at 118.)

The situation presented to appellant may fairly be summarized as follows: her position as Librarian, GS-11, was summarily taken from her. With that as a *fait accompli*, the agency gave her the choice of either accepting a six-grade-level demotion or being left with no income.[4]

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[2] Dr. Newsom Stool, orthopedist, and Dr. Delbert Chumley, gastroenterologist.

[3] Memorandum for the Record dated February 22, 1980, from Robert L. Neal, Employee Relations Specialist.

[4] The agency placed appellant in an involuntary leave status pursuant to the authority of 5 C.F.R. 831.1206. For purposes of this appeal, we need not determine whether that regulation is a valid implementation of its statutory

As to the disability retirement option, it appears to us far from certain that such would have been granted on the basis of the medical reports. Even assuming it likely that she would have been granted disability retirement, her most optimistic prospect was at least a four-to-six-month waiting period with no income. In short, only one of appellant's "options" provided her with food and rent money. (H. T. at 118.) As the presiding official noted, *Christie v. United States*, 518 F.2d 584, 587 (Ct.Cl. 1975) holds that a choice limited to two unpleasant alternatives does not necessarily obviate the voluntariness of the one chosen. However, the question of voluntariness is to be determined by an examination of the surrounding circumstances. *Perlman v. United States*, 490 F.2d 928, 933 (Ct.Cl. 1974). In *Christie, supra,* the plaintiff had the option of remaining in her position and contesting an adverse action. Appellant had no such option. Her only means of continued income was to accept the demotion. Here, both the demotion and the disability retirement were agency-initiated.

The agency, by forcing appellant to "choose" which involuntary action it would take, sought to avoid the procedures and appeal rights incident to an agency-initiated demotion. In short, the agency structured its action in such a manner so as to accomplish an adverse action without utilizing the procedures required by Chapter 75, Title 5, United States Code. Such an attempt must fail. The choice as structured by the agency meets the tripart test for duress set forth in *Leone v. United States*, 204 Ct.Cl. 334, 339 (1974):

> (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *Fruhauf Southwest Garment Co. v. United States*, 111 F.Supp. 945, 951 (1953).

The agency's action was particularly coercive as applied to this appellant in view of the unanimous medical opinion that she was suffering from emotional problems and stress. Although duress is not measured by the employee's subjective evaluation of a situation, *Christie, supra,* an agency may not take advantage

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authority, 5 U.S.C. 8347(a). We note, however, that the emergency circumstances described therein are identical to those set forth at 5 C.F.R. 752.404 (d)(3). We have required the Office of Personnel Management to submit a brief as to the validity of emergency suspensions under section 752.404(d)(3). *Danny Cuellar v. United States Postal Service*, MSPB order no. SF075299045 (November 3, 1980). In any event, we find that appellant's medical condition as described in the doctors' reports of record did not present an emergency situation such as is described in section 831.1206. The placing of appellant in an involuntary leave status when she was willing and able to perform her duties was erroneous. 39 Comp. Gen. 154.

of an employee's known weakness, illness or problem in order to press an undue advantage. *See Liebke v. Brown*, 312 F.Supp. 1053 (D. Mass. 1970).

Accordingly, the Board assumes jurisdiction of this case pursuant to 5 U.S.C. 7512(3) and 7701(a), and REVERSES the agency's action, because of the agency's failure to provide appellant with any of the applicable procedural protections of 5 U.S.C. 7513. Under the circumstances, the agency's action clearly amounted to harmful error. 5 U.S.C. 7701(c)(2)(A).

In view of our disposition of this case, we find it unnecessary to adjudicate appellant's affirmative defense that the agency's action had been taken in reprisal for her exercise of protected activities. We note, however, that the presiding official erred when he found that appellant's supervisor had been unaware that she had filed EEO discrimination charges against him. We find that the supervisor was aware of that fact. (H. T. at 95.) Furthermore, our decision *In the matter of: Robert J. Frazier, Jr., et al.*, 1 MSPB 159, 180 (1979) requires only that the retaliating official have actual *or constructive* knowledge of the protected activity.

Appellant has required an award of attorney's fees. A motion for award of attorney's fees may be made to the presiding official within 10 days of the final date of this decision. 5 C.F.R. 1201.37 (a)(2).

Accordingly, it is ORDERED that:

1. The initial decision dated August 7, 1980 is REVERSED.
2. The Department of the Army is directed to cancel the personnel action by which it demoted Helene T. Morrow from her position to that of Management Assistant, GS-5.
3. The Department of the Army is directed to restore Helene T. Morrow to her position as Librarian, GS-11, Step 5.
4. Within ten (10) days of the date hereof, the Department of the Army shall file with the Board's Dallas Field Office written verification of its compliance with paragraphs (2) and (3) of this Order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT R. TAYLOR
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
SE531D09001

OPINION AND ORDER

The appellant, employed as a GS-13 Chief of Contract Health Services with the Department of Health and Human Services, received an agency determination on May 10, 1979, that because his work was not of an acceptable level of competence (ALOC) his within-grade step increase in salary would be denied. He requested reconsideration by a higher level agency official, who sustained the negative determination by a reconsideration decision issued June 25, 1979.

The appellant then pursued his right of appeal to the Board's Seattle Field Office. He claimed that the reconsideration decision did not consider issues he presented in his request for reconsideration, namely: the issue of the absence of established performance standards; the agency's alleged failure to provide him with adequate training or corrective instruction; and his contention that there was a disparity between the agency's 60-day warning of a possible withholding of the within-grade increase and the agency's June 25, 1979, decision to withhold. In regard to the issue of performance standards, the presiding official concluded that performance standards drafted by the appellant were not used in the negative ALOC determination and that therefore the absence of such standards was immaterial. The presiding official also found that the record supported a finding that the agency adequately provided training and instruction. Because the appellant did not explain what disparities he perceived to be present in the two notices to the appellant, nor how these alleged disparities affected the action against him, the presiding official did not consider the disparity claim. After a review of all the evidence presented, the presiding official found that the negative ALOC determination was supported by a preponderance of the evidence.

In his petition for review, the appellant contended that the presiding official erroneously based his decision upon the June 25 reconsideration decision rather than the May 10 decision. He further argued that the presiding official placed too much emphasis upon a statement against interest made by the appellant, and that he failed to review all of the evidence. The appellant argued, additionally, that all of the deficiencies in the May 10 decision letter were not proved by a preponderance of the evidence. He presented arguments against each of the five examples of deficiencies. Finally, the appellant contended that the presiding official erred in summarily dismissing as a non-issue the appellant's allegation that performance standards were not used in the agency's negative ALOC determination.

Although the presiding official cited the reconsideration decision in his opinion, the appellant has not shown how he was harmed by the presiding official's discussion of the allegations summarized in the reconsideration decision rather than those same charges stated in the May 10th letter. We find, therefore, that no harm resulted in the presiding official's approach to the review of the charges against the appellant.

The initial decision does not indicate that the presiding official failed to consider all the evidence presented. Although he did consider statements made in a meeting by the appellant which acknowledged that the appellant felt unqualified to perform his job, the initial decision was not based wholly on this evidence.

Additionally, the appellant disagreed with the presiding official's interpretation of the factual evidence in regard to the five examples of deficiencies charged by the agency. In this connection, the appellant submitted no new and material evidence which was not available when the record was closed. A mere conclusory allegation of factual error is not sufficient to trigger a review of such determinations. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

With regard to the presiding official's determination that the action of the agency in withholding appellant's within-grade increase was supported by a preponderance of the evidence, we held in *William E. Parker v. Defense Logistics Agency*, 1 MSPB 489, 506 (1980) that appeals to the Board under 5 U.S.C. 5335(c) are controlled by 5 U.S.C. 7701(c)(1)(A), which requires proof by the lesser evidentiary standard of "substantial evidence." Since the presiding official found that the agency met the higher burden of proof, no harm accrued to the appellant.

Finally, the appellant contended that the absence of performance standards was indeed an issue because he questioned the ability of the decisionmaker to make an objective decision regarding his within-grade increase without such standards. However, before an agency has established performance appraisal standards, it can make a negative ALOC determination as long as the shortcomings charged are significant for the appellant's position and the shortcomings are proved by substantial evidence. *See Parker, supra,* 505-506. We affirm the presiding official's determination that the agency has met its burden.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113 (b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *December 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WIDMON R. BUTLER
v.
U.S. DEPARTMENT OF LABOR

Docket No.
DC043209006

OPINION AND ORDER

Petitioner, a nonpreference eligible employee in the excepted service, was removed from his position with the Department of Labor, allegedly because of unsatisfactory performance. His appeal to the Washington, D.C. Field Office of the Board was dismissed for lack of jurisdiction.

In his petition for review, petitioner contended that the Office of Personnel Management (OPM) had the authority to exclude nonpreference eligible employees from the performance appraisal system under 5 C.F.R. 430.201(a), but, because it failed to do so, nonpreference eligibles are entitled to appeal to the Board under 5 U.S.C. 4303(e). Petitioner also contended that his removal was motivated by racial discrimination.

Because petitioner was occupying a position not excluded by OPM from the performance appraisal system, he qualified as an "employee" within the meaning of 5 U.S.C. 4301(2)(G). Therefore, he would be covered by a performance appraisal system established under 5 U.S.C. 4302 and subject to certain procedural rights under 5 U.S.C. 4303(b)-(d). However, petitioner's appeal rights to the Board are specifically controlled by 5 U.S.C. 4303(e) which limits the right of appeal to the Board from removal under the performance appraisal system to preference eligibles and competitive service employees. The exclusion of nonpreference eligibles under 5 U.S.C. 4303(e) is consistent with a similar exclusion of nonpreference eligibles under 5 U.S.C. 7511(a).

Although 5 U.S.C. 4301(2)(G) excludes from coverage of Chapter 43, Subchapter I, only those employees in the excepted service who are excluded by OPM, section 4303(e) specifically denies an appeal right from section 4303 actions to nonpreference eligibles and those not in the competitive service. Thus, the two provisions are consistent, and petitioner, as a nonpreference eligible employee, has no right of appeal to the Board. Also, the discrimination issue raised by petitioner thus is not within the jurisdiction of the Board. *See* 5 U.S.C. 7702(a)(1); *Smith v.*

Department of Health, Education, and Welfare, 3 MSPB 4 (1980).

Accordingly, the petition fails to meet the criteria for review set forth at 5 C.F.R. 1201.115 and is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Petitioner is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after petitioner's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 22, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ACTING SPECIAL COUNSEL v. DEPARTMENT OF THE TREASURY	Docket No. HQ12088110008

OPINION AND ORDER

On December 12, 1980, the Acting Special Counsel filed a petition with the Board pursuant to 5 U.S.C. sec. 1208(a) requesting a stay of the "personnel action" by the Department of the Treasury, Internal Revenue Service (IRS), refusing to allow Donna Enochs to be represented by the National Treasury Employees Union (NTEU) concerning her proposed removal from her position as a special agent in the Criminal Investigation Division, Springfield, Illinois, District Office, IRS. This petition was denied without prejudice on December 17, 1980, for the Acting Special Counsel's failure to submit any documentation in support of her conclusion that a prohibited personnel practice had occurred. Subsequently, on December 18, 1980, the Acting Special Counsel submitted a "Motion for Reconsideration" of the Board's decision to deny the stay. This motion, which will be treated as a new petition for stay pursuant to section 1208(a), is now supported to some extent by exhibits and attachments.

The Civil Service Reform Act, Public Law No. 95-454, 92 Stat. 1111 (1978), states that a stay of a personnel action may be requested "if the Special Counsel determines that there are reasonable grounds to believe that the *personnel action* was taken, or is to be taken, as a result of a prohibited personnel practice." 5 U.S.C. sec. 1208(a) (emphasis added). Therefore, it is clear that in order for a stay to be granted, a personnel action, as defined at 5 U.S.C. sec. 2302(a)(2)(A), must have taken place, or be about to take place.

The Acting Special Counsel apparently presents two distinct legal theories in support of her belief that a stay would be appropriate in this case. Implicit in her petition is that a prohibited personnel practice occurring as a result of a personnel action may be stayed. However, as was noted above, the statute specifically states that only a personnel action may be stayed.

The Acting Special Counsel's second argument is that IRS's decision to disqualify NTEU is in fact "tantamount" to a personnel action, and thus may be stayed. In support of this conclusion, the

Acting Special Counsel first asserts that the proposed removal is clearly a personnel action under section 2302(a) (2) (A) (iii). She further notes that 5 U.S.C. sec. 7513(b) (3) and 5 C.F.R. sec. 1201.31 (1980) give an employee the right to be represented before the Board by any representative willing to serve who is not disqualified on the grounds of conflict of interest or position, and argues that the Board's decisions in *Price v. Department of the Treasury,* 3 MSPB 314 (1980) and *Sweeney v. Department of the Treasury,* 3 MSPB 321 (1980) preclude a finding of conflict of interest in the current case.[1] In light of this, she concludes that IRS's decision denying Enochs her choice of representative is wrongful, and is "tantamount to a personnel action since it relates to and provides procedures for a proposed removal action, as provided under section 7513(b)." Acting Special Counsel Petition dated December 18, 1980, at 2. The Acting Special Counsel then argues that the "personnel action" denying Enochs her right to be represented by NTEU constituted a prohibited personnel practice under 5 U.S.C. sec. 2302(b) (11).

However, the Acting Special Counsel's conclusion that the decision to deny Enochs her choice of representative was a personnel action within the meaning of the statute is incorrect. The reason for this holding is that the challenged action, the agency's decision to disqualify NTEU as Enochs' representative, is not listed as a personnel action under section 2302(a) (2) (A). Because the agency action is not a "personnel action," it cannot be stayed pursuant to 5 U.S.C. sec. 1208(a), no matter how wrongful that action may be. Accordingly, the Acting Special Counsel's petition for a stay is hereby DENIED.

The Acting Special Counsel has also asked the Board to require the IRS to show cause why sanctions should not be imposed under 5 U.S.C. sec. 1205(d) (2) and 5 C.F.R. sec. 1201.43 (1980) for IRS's refusal to comply with the Board's orders in *Sweeney* and *Price.* However, the Board has issued no orders in the current case with which the IRS has refused to comply; therefore, that request is also DENIED.

For the Board:

ERSA H. POSTON.

Washington, D.C., *December 23, 1980*

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[1] In *Price* and *Sweeney,* the Board held that the IRS had failed to satisfy its burden of proving that a conflict of interest was created by NTEU representation of special agents in the Criminal Investigation Division. However, those cases were based on the above cited sections of the statute and the regulations, which apply to hearings before the Board. In the current case, IRS has disqualified NTEU from representing Enoch in her hearing before the agency. Of course, no opinion is expressed at this time as to the merits of the argument that Enochs was incorrectly denied representation by NTEU.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ELLSWORTH S. COLLINS
v.
U.S. POSTAL SERVICE

Docket No.
PH315H8010111

OPINION AND ORDER

Appellant, a preference eligible employee, appealed from an action by the United States Postal Service, Philadelphia, Pennsylvania, which terminated his employment prior to his completion of one year of current continuous service. Specifically, appellant was charged with physically assaulting a fellow employee.

In the initial decision, the presiding official dismissed the appeal for lack of jurisdiction by the Board, holding that:

> Under 5 U.S.C. Section 7701(a), the Merit Systems Protection Board has jurisdiction over appeals by employees from any action which is made appealable to the Board under any law, rule, or regulation. Actions affecting an employee's termination are normally appealable to the Merit Systems Protection Board, but the appellant must come within the statutory definition of "employee" before the Board has jurisdiction over the appeal. Under 5 U.S.C. Section 7511, the definition of employee includes *inter alia,* "(B) a preference eligible . . . in the United States Postal Service . . . who has completed one year of current, continuous service in the same or similar positions."

We agree with the analysis and findings of the presiding official that we do not have jurisdiction over appellant's appeal. See *Metz v. USPS,* 2 MSPB 103 (1980); *Viloria v. USPS,* 2 MSPB 107 (1980).

The Board having fully considered appellant's petition for review of the initial decision issued on September 4, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for

judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *December 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

AARON MASCARENAS
v.
U.S. POSTAL SERVICE

Docket No.
DE07528010036

OPINION AND ORDER

Appellant appealed from an action by the United States Postal Service, Salt Lake City, Utah, which removed him from the position of Custodial Laborer, effective April 18, 1980. Appellant was charged by the agency with failure to be in his assigned work area on February 22, and 28, 1980, absence without leave (AWOL) on the foregoing dates, and failure to follow instructions regarding the procedure to end his tour of duty on February 23, 1980. Two previous disciplinary actions against appellant were cited by the agency in support of its choice of the penalty imposed.

Appellant alleged that the agency's removal action was the result of discrimination due to his national origin, Mexican-American, and his disabled veterans status. Additionally, he alleged various procedural defects in the agency's removal action.

The presiding official in the initial decision found that the testimony of appellant was not credible, that the record revealed that appellant had received progressive discipline pertinent to his behavior by the agency, that there were no violations by the agency of appellant's procedural rights pursuant to 5 U.S.C. 7513(b), and that the agency's action was supported by the preponderance of the evidence of record. 5 U.S.C. 7701(c)(1)(B).

Concerning appellant's allegation of discrimination, the presiding official found that appellant failed to demonstrate that the agency treated him differently from non-Mexican-American employees or non-disabled veterans. Hence, the presiding official found that appellant had failed to present even a prima facie case of discrimination.

Appellant in his petition for review alleged that the presiding official erroneously found that the agency's removal action was supported by a preponderance of the evidence.

The Board finds that appellant's unsupported allegation is simply a disagreement with the presiding official's finding. The petition fails to advance specific references to evidence of record to call that finding into question.

Thus, the Board finds that the review requirement set forth in *Claude Weaver v. Department of the Navy*, 2 MSPB 297 (1980), has not been met; nor have the regulatory criteria for review been met by the petition. *See* 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *December 31, 1980*

SHORT DENIALS AND DISMISSALS

ADAMS, Laverne C. v. Veterans Administration (Docket No. DC075209078) (10/31/80)

ARCHER, Lennox J. v. Smithsonian Institution (Docket No. DE075209148) (11/3/80)

BABIN, Patrick J. v. Veterans Administration (Docket No. AT035109034) (11/10/80)

BAILEY, Kenneth v. Dept. of Commerce (Docket No. AT075209127) (11/25/80)

BALENCIE, Roland S. v. Dept. of the Navy (Docket No. DA07528010010) (12/22/80)

BANKS, Titus v. Dept. of the Navy (Docket No. PH300A09012) (11/24/80)

BARNES, Donald J. v. Dept. of the Air Force (Docket No. DA075209184) (11/5/80)

BARNES, Donald J. v. Dept. of the Air Force (Docket No. DA075209184) (11/18/80)

BARNES, Edwin F. v. Dept. of the Air Force (Docket No. AT075209073) (10/30/80)

BATES, Rose v. Office of Personnel Management (Docket No. SL831L8010022) (12/15/80)

BAXTER, Delmar v. Veterans Administration Hospital St. Louis, Missouri (Docket No. SL075209018) (10/31/80)

BAY, John W. v. Dept. of Transportation, Federal Aviation Administration (Docket No. AT075209082) (11/17/80)

BEASLEY, James R. v. Dept. of the Air Force (Docket No. AT035109017) (11/17/80)

BEATTIE, Douglas J. v. Dept. of Agriculture (Docket No. NY075209005) (10/14/80)

BECKLEY, Brendan P. v. Dept. of Labor (Docket No. BN075209055) (11/26/80)

BENTON, Emuel v. U.S. Postal Service (Docket No. NY075299003) (11/12/80)

BERMUDEZ, Arthur R. v. Dept. of Justice (Docket No. SF315H09020) (12/16/80)

BERRY, Alfred T. v. U.S. Postal Service (Docket No. CH075209170) (11/6/80)

BISIER, Alan G. v. Dept. of the Navy (Docket No. BN075209052) (10/24/80)

BLAIR, Doris K. v. Veterans Administration (Docket No. PH075299027) (11/4/80)

BOLTON, Eddie v. Army and Air Force Exchange Service (Docket No. AT075209187) (11/3/80)

BOSTIC, Veda Ann v. Dept. of Agriculture Forest Service (Docket No. PH043209016) (11/24/80)

BOTKIN, Marybelle v. Dept. of the Navy (Docket No. SF315H09014) (10/16/80)

BOYD, Carroll E. v. Dept. of the Air Force (Docket No. SF531D09009) (11/18/80)

BRADBIE, Powhatan S. v. Equal Employment Opportunity Commission (Docket No. PH075209156) (12/8/80)

BRADLOW, Harvey B. v. Dept. of the Navy (Docket No. PH075209125) (12/10/80)

BRICE, Louise S. v. Dept. of the Army (Docket No. PH07528010092) (12/4/80)

BRISCOE, Melvin J. v. Dept. of the Navy (Docket No. DC075209202) (11/18/80)

BROWN, Percy, Jr. v. Veterans Administration (Docket No. SL075209011) (10/28/80)

BROWN, William J. v. Office of Personnel Management (Docket No. DA831L09007) (10/21/80)

BRUNO, Robert S. v. Dept. of Labor (Docket No. SL075209023) (12/29/80)

BULLOCK, Willie F. v. Smithsonian Institution (Docket No. DC07528010228) (11/4/80)

BYRD, Eugene v. General Services Administration (Docket No. DC075209223) (10/14/80)

BYRNE, William v. Internal Revenue Service (Docket No. NY075209008) (11/26/80)

CALIFF, Enid v. Dept. of the Army (Docket No. NY075209126) (10/14/80)

CAMPBELL, Donald v. General Services Administration (Docket No. SL075299009) (10/16/80)

CARLSON, James M., Jr. v. U.S. Customs Service (Docket No. CH075209092) (10/30/80)

CARRIGAN, David F. v. Dept. of the Navy (Docket No. SF315H09024) (11/17/80)

CARSON, Willie L. v. Dept. of the Navy (Docket No. PH075299063) (11/5/80)

CHESTNUT, Vivian A. v. Dept. of the Navy (Docket No. CH075209086) (10/28/80)

CLARK, Kenneth L. v. Dept. of the Navy (Docket No. SE075209073) (12/19/80)

COOK, Thomas R., Jr. v. Dept. of Justice (Docket No. DC075299093) (11/18/80)

CRAWFORD, Benjamin A. v. Dept. of the Army (Docket No. PH315H8010028) (10/24/80)

CRAWFORD, William v. Dept. of the Army (Docket No. PH075209134) (12/3/80)

CUMMINGS, Beverly J. v. Dept. of the Air Force (Docket No. AT075209234) (11/17/80)

CURTIS, Monroe A. Dept. of the Army (Docket No. DA075209166) (11/4/80)

CUSTARD, Leonard O. v. U.S. Postal Service (Docket No. CH075209210) (10/28/80)

DAVIS, Rhoda v. Dept. of the Air Force (Docket No. AT075209279) (12/15/80)

DIAZ, Nell S. v. Securities and Exchange Commission (Docket No. DA043209009) (10/31/80)

DONN, Steve J. v. Veterans Administration (Docket No. SF075209208) (10/16/80)

DONNELLY, James A. v. Dept. of the Navy (Docket No. PH035309003) (11/12/80)

DONOHUE, Vincent J. v. Dept. of the Navy (Docket No. PH315H99047) (11/10/80)

DUKE, Michael v. U.S. Postal Service (Docket No. CH075209187) (11/18/80)

DUNLAP, Dennis v. U.S. Postal Service (Docket No. CH07528010042) (11/3/80)

DUKE, Michael v. U.S. Postal Service (Docket No. CH075209187) (11/18/80) (11/24/80)

DUPREE, Gary G. v. Dept. of the Army (Docket No. SF075209207) (10/14/80)

EDGESTON, Walter v. U.S. Postal Service (Docket No. CH075209090) (10/30/80)

EISELE, James W. v. Consumer Product Safety Commission (Docket No. DC075209186) (10/14/80)

ELEY, Karen B. v. Veterans Administration (Docket No. CH075209075) (11/7/80)

ESKEW, Katherine M. v. Dept. of Education (Docket No. SF075299035) (11/20/80)

FIECKO, Chester T. v. Dept. of the Navy (Docket No. SF075209188) (11/17/80)

FISCHER, Henry R., Jr. v. Veterans Administration (Docket No. AT075209190) (11/4/80)

FITZGERALD, Gettis W. v. Veterans Administration (Docket No. AT075299067) (10/28/80)

FOGG, Donald v. Dept. of the Navy (Docket No. BN035109011) (10/29/80)

FOLEY, Severin D. v. Dept. of the Treasury (Docket No. SL315H09010) (11/4/80)

FRANCIS, Donald E. v. Dept. of Agriculture (Docket No. SE075209058) (10/10/80)

FRANKLIN, Marion B. v. Dept. of the Navy (Docket No. NY075209115) (11/26/80)

FRAZEE, Robert E. v. Dept. of the Air Force (Docket No. DE035109014) (11/20/80)

GALATZ, Joseph L. v. Dept. of Commerce (Docket No. SF315H09003) (10/14/80)

GARDNER, Dorothy S. v. Dept. of the Army (Docket No. AT075209205) (10/16/80)

GELLER, Bernard A. v. Dept. of the Navy (Docket No. BN075209048) (10/14/80)

GENKINGER, Norman P. v. Federal Aviation Administration (Docket No. AT075209173) (12/8/80)

GERARD, Conrad A. v. Dept. of Transportation Federal Aviation Administration (Docket No. PH075209141) (10/23/80)

GERARD, Conrad A. v. Dept. of Transportation, Federal Aviation Administration Office of Personnel Management (Docket No. PH083109004) (11/7/80)

GERARD, Conrad A. v. Dept. of Transportation (Docket No. PH083109004) (11/20/80)

GIULIANA, Ronald R. v. Dept. of Transportation (Docket No. DE03158010025) (10/14/80)

GONZALES, John L. v. U.S. Postal Service (Docket No. DE075299023) (10/29/80)

GONZALES, William v. Dept. of the Treasury (Docket No. CH075209134) (11/7/80)

GOODWIN, James R. v. U.S. Postal Service (Docket No. DA075209254) (11/20/80)

GREEN, William, Jr. v. U.S. Postal Service (Docket No. DA075209017) (10/28/80)

GULDEN, Charles v. Dept. of the Army (Docket No. DC075209204) (10/21/80)

GUNN, Patricia L. v. Veterans Administration (Docket No. CH075209089) (10/24/80)

GUTIERREZ, Derly M. v. Federal Aviation Administration (Docket No. DA075209189) (10/31/80)

HAMILTON, Milton v. Dept. of the Navy (Docket No. DC075299044) (10/28/80)

HAMMEL, Wilbur J. v. Dept. of the Navy (Docket No. DC07528010014) (10/10/80)

HARDY, Brett F. v. Dept. of Health and Human Services (Docket No. DE531D09004) (11/20/80)

HARRIS, Alma T. v. Office of Personnel Management (Docket No. AT831L09030) (12/15/80)

HARRIS, Charles R. v. Veterans Administration (Docket No. AT075209142) (11/20/80)

HARRIS, Johanna P. v. Dept. of the Army (Docket No. PH075209115) (11/14/80)

HAYES, Lloyd J. v. Government Printing Office (Docket No. DC075209222) (10/21/80)

HAYNES, Benjamin C., Jr. v. Dept. of Agriculture (Docket No. AT075209191) (10/21/80)

HAYNES, Rosa C. v. Dept. of the Navy (Docket No. PH07528010103) (12/15/80)

HEIN, Ronald G. v. Office of Personnel Management (Docket No. DC083109002) (11/18/80)

HENSON, Eugene O. v. Dept. of the Army (Docket No. DC035109008) (10/31/80)

HEWELL, Freddie L. v. U.S. Postal Service (Docket No. DA075299042) (10/29/80)

HILDRETH, Jon I. v. U.S. Customs Service (Docket No. AT075209213) (11/24/80)

HODNICK, Anthony R. v. Federal Mediation and Conciliation Service (Docket No. SF075209218) (11/3/80)

HOLCOMBE, Thomas L., Jr. v. Veterans Administration (Docket No. AT075299076) (11/19/80)

HOLDER, Gene B. v. Dept. of the Army (Docket No. SF075299044) (11/5/80)

HOLDER, Gene B. v. Dept. of the Army (Docket No. SF531D99006) (11/5/80)

HOLMES, Louis B. v. Dept. of the Navy (Docket No. PH075209078) (11/17/80)

HOLMES, Samuel M. v. Dept. of the Navy (Docket No. AT075209061) (10/10/80)

HOLOWITI, William v. Dept. of the Navy (Docket No. AT075209078) (10/10/80)

HUNDLEY, Ricardo E. v. Dept. of the Navy (Docket No. PH075209051) (10/23/80)

HUNTER, Barbara M. v. Dept. of Health, Education, & Welfare (Docket No. CH315H09022) (11/4/80)

HUNTER, Cornell D. v. U.S. Postal Service (Docket No. SF075209226) (11/26/80)

IGE, Ralph K. v. Dept. of the Army (Docket No. SF075209014) (10/14/80)

INFINGER, Ernest, et al. v. Dept. of the Air Force (Docket No. AT075299004) (11/14/80)

IVY, George E. v. Army and Air Force Exchange Service (Docket No. DA075209064) (11/4/80)

JOHNSON, Benjamin, Jr. v. Dept. of the Air Force (Docket No. AT075209110) (11/26/80)

JOHNSON, Ernestine B. v. Dept. of Health and Human Services (Docket No. AT315H09017) (10/21/80)

JOHNSON, Tilghman V. v. U.S. Postal Service (Docket No. SL075209026) (10/10/80)

JONES, Richard C. v. Dept. of the Army (Docket No. DA035109024) (10/21/80)

KANE, Marian H. v. Dept. of the Navy (Docket No. PH315H99015) (10/28/80)

KASPER, Pauline v. Dept. of the Air Force (Docket No. SF035109005) (10/31/80)

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INDEX

EXPLANATORY NOTES

This index to Volume 4, *Decisions of the United States Merit Systems Protection Board*, provides access to the Board's actions compiled in this volume only. This is a departure from the format followed in Volumes 1 and 2, where a separate index volume was published. In the future each volume of *Decisions of the United States Merit Systems Protection Board* will contain an index with the same features contained in the separate index for Volumes 1 and 2.

The index aids research into Volume 4 *Decisions of the United States Merit Systems Protection Board* with: Major Topics, Scope Notes for Major Topics, Outline of Topics, Decisions Listed Under Key Numbers, Alphabetical List of Words and Phrases, and Regulations and Statutes. These aids are interrelated and may be used to find key numbers and cases on a subject of interest to the researcher.

The Major Topics, Scope Notes for Major Topics, Outline of Topics, and Decisions Listed Under Key Numbers provide the researcher access by subject matter to the Board's actions printed in Volume 4 in *Decisions of the United States Merit Systems Protection Board*. Major Topics is a broad division of subject matter into 17 main areas by key numbers. The Scope Notes for Major Topics defines generally the subjects that fall within a major topic and suggests other major topics that the researcher may wish to examine. The Outline of Topics divides each major topic into more specific subtopics. These topics bear a key number based on the major topic and the degree of specificity of the subtopic.

Examination of the Outline of Topics will show the method by which the subtopics are numbered. Subtopics may be added in the future.

When the researcher has found the relevant key numbers, the Decisions Listed Under Key Numbers will provide the reference to Board actions on the subject. Where the Board issued multiple and identical documents for each of the proceedings listed in the caption of the document, only one document has been printed. Only the lead name in the captions is listed.

The Alphabetical List of Words and Phrases provides a cross-reference to key numbers under which actions relating to the word or phrase may be found in the Outline of Topics. The purpose of this list is to provide the researcher a way to identify a subject by different words that might be used to describe the subject matter. In parentheses after the key numbers are word guides to identify the major topic and subtopic to which each key number relates.

The list of Regulations and Statutes provides a cross-reference to key numbers under which actions relating to the subject of the statutory provision or regulation may be found in the Outline of Topics. The key number will provide access to the Outline of Topics and the Decisions Listed Under Key Numbers.

MAJOR TOPICS
(With Key Numbers)

1.000000 ADVERSE ACTIONS

2.000000 CONSTITUTIONALITY

3.000000 DISCRIMINATION

4.000000 EVIDENCE

5.000000 FREEDOM OF INFORMATION, PRIVACY, AND SUNSHINE ACTS

6.000000 JURISDICTION

7.000000 LABOR-MANAGEMENT RELATIONS

8.000000 PARTICULAR EMPLOYMENT CATEGORIES

9.000000 PERFORMANCE RELATED ACTIONS

10.000000 PRACTICE AND PROCEDURE

11.000000 PROHIBITED PERSONNEL PRACTICES

12.000000 REDUCTIONS IN FORCE

13.000000 REGULATION REVIEW

14.000000 REMEDIES

15.000000 RETIREMENT

16.000000 SPECIAL COUNSEL

17.000000 SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS

SCOPE NOTES FOR MAJOR TOPICS

ADVERSE ACTIONS (1.000000)

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

CONSTITUTIONALITY (2.000000)

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

DISCRIMINATION (3.000000)

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

Evidence (4.000000)

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

Freedom of Information, Privacy and Sunshine Acts (5.000000)

This topic references Board cases relating to the Freedom of Information, Privacy and Sunshine Acts.

Jurisdiction (6.000000)

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement* (15.000000).

Labor-Management Relations (7.000000)

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

Particular Employment Categories (8.000000)

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were germane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

PERFORMANCE RELATED ACTIONS (9.000000)

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems had not yet been implemented.

PRACTICE AND PROCEDURE (10.000000)

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

PROHIBITED PERSONNEL PRACTICES (11.000000)

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

REDUCTIONS IN FORCE (12.000000)

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

REGULATION REVIEW (13.000000)

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

REMEDIES (14.000000)

This topic references Board cases dealing with the remedial powers of the Board, e.g., attorney fees.

RETIREMENT (15.000000)

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

SPECIAL COUNSEL (16.000000)

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work Schedule Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000)*.

SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS (17.000000)

This topic references cases dealing with issues of suitability. Included also are cases involving fitness for duty examinations.

OUTLINE OF TOPICS

(With Key Numbers)

1.000000 Adverse Actions

1.100 ACTIONS CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.110 Removal
1.111 Involuntary Resignation or Retirement
1.120 Suspension for more than 14 days
1.130 Reduction in Grade
1.140 Reduction in Pay
1.150 Furlough of 30 days or less

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.210 Suspension for less than 14 days
1.220 Letter of Reprimand
1.230 Actions Based on Unacceptable Performance
1.231 Denial of Within Grade Step Increase
1.232 Reduction in Grade
1.233 Removal
1.240 Reduction in Force

1.300 SUBSTANTIVE CHARGES

1.310 Attendance Related
1.311 Absence Without Leave
1.312 Abuse of Leave
1.313 Tardiness
1.320 Alcohol and Drug Related
1.321 On-Duty Conduct
1.322 Off-Duty Conduct
1.330 Criminal Conduct
1.331 On-Duty Conduct
1.3311 Criminal Charges
1.3312 Criminal Conviction
1.332 Off-Duty Conduct
1.3321 Criminal Charges
1.3322 Criminal Conviction
1.340 Dishonest Work Related Conduct
1.341 Bribery
1.342 Embezzlement

1.343 Falsification
1.344 Fraud
1.345 Misappropriation and/or Misuse of Government Property
1.346 Malfeasance in Office

1.350 Prohibited Political Activity

1.360 Other Work Related Charges

1.361 Abuse of Authority
1.3611 Sexual Harassment
1.3612 Prohibited Discrimination
1.362 Conflict of Interest
1.363 Insubordination
1.3631 Refusal to Accept Reassignment
1.364 Gross Waste
1.365 Creation of Danger to Public Health and Safety
1.366 Insolence
1.367 Violence

1.370 Charges Related to Off-Duty Conduct

1.371 Efficiency of the Service
1.3711 Nexus

1.400 BOARD CONSIDERATION OF PENALTIES

1.410 Mitigation of Penalty
1.420 Prior Disciplinary Record
1.430 Disparate Treatment of Similarly Situated Employees

2.000000 Constitutionality

2.100 DUE PROCESS

2.110 Liberty Rights or Interest
2.120 Property Rights or Interest
2.130 Requisite Administrative Procedures

2.200 CRIMINAL CONSTITUTIONAL CONSIDERATIONS

2.210 Self-Incrimination
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2.311 Relation to Efficiency of the Service
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2.321 Relation to Efficiency of the Service
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2.3212 Establishment

2.400 RIGHT TO PRIVACY

3.000000 Discrimination

3.100 PROHIBITED DISCRIMINATION

3.110 Age Discrimination

3.111 Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a

3.120 Race, Color, and National Origin Discrimination

3.121 Civil Rights Act of 1964, 42 U.S.C. 2000e-16

3.130 Handicap Discrimination

3.131 Handicapping Condition
3.1311 Physical Disability
3.1312 Mental Disability
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3.1321 Reasonable Accommodation
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3.140 Sex Discrimination

3.141 Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.142 Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)
3.143 Sexual Preference
3.144 Sexual Harassment

3.150 Religious Discrimination

3.151 Civil Rights Act of 1964, 42 U.S.C. 2000e-16

3.160 Marital Status Discrimination

3.170 Discrimination on the Basis of Political Affiliation

3.200 DISPARATE TREATMENT OF SIMILARLY SITUATED EMPLOYEES

3.300 AFFIRMATIVE ACTION

3.310 Minorities

3.320 Handicapped Persons

3.330 Women

4.000000 Evidence

4.100 ADMISSIBILITY

4.110 Prehearing Evidence

4.111 Admissions
4.112 Affidavits
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4.1131 Depositions
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1.100 ACTIONS CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.110 Removal

Joseph E. Agnes v. *U.S. Postal Service*, 4 MSPB 258 (1980); *Milton C. Anderson* v. *Dept. of Defense Dependent Schools*, 4 MSPB 70 (1980); *Denise G. Angell* v. *Dept. of the Navy*, 4 MSPB 340 (1980); *John L. Bandy* v. *Dept. of the Navy*, 4 MSPB 295 (1980); *Linda L. Banks* v. *Dept. of the Air Force*, 4 MSPB 342 (1980); *Judy Barnett* v. *Veterans Administration*, 4 MSPB 450 (1980); *Benjamin Belton* v. *Dept. of the Navy*, 4 MSPB 3 (1980); *John H. Bradley* v. *Defense Communications Agency*, 4 MSPB 20 (1980); *Pauline J. Brink* v. *Veterans Administration*, 4 MSPB 419 (1980); *Roger R. Butts* v. *Dept. of the Treasury*, 4 MSPB 270 (1980); *Edward Chow* v. *Social Security Administration*, 4 MSPB 300 (1980); *Frederick M. Clark* v. *Dept. of the Navy*, 4 MSPB 60 (1980); *James H. Cole* v. *Dept. of the Treasury*, 4 MSPB 304 (1980); *Ellsworth S. Collins* v. *U.S. Postal Service*, 4 MSPB 505 (1980); *Peggy J. Cox* v. *U.S. International Trade Commission*, 4 MSPB 272 (1980); *Tommie Davis* v. *U.S. Postal Service*, 4 MSPB 346 (1980); *Ronald Desiderio* v. *Dept. of the Navy*, 4 MSPB 171 (1980); *John M. Doles* v. *U.S. Postal Service*, 4 MSPB 65 (1980); *Charles O. Donaldson, Jr.* v. *U.S. Postal Service*, 4 MSPB 62 (1980); *Billy E. Elkins* v. *Dept. of Justice*, 4 MSPB 306 (1980); *Walter E. Gildersleeve* v. *U.S. Postal Service*, 4 MSPB 465 (1980); *Charles P. Hale* v. *Dept. of the Navy*, 4 MSPB 41 (1980); *Simmie E. Hensley* v. *Dept. of the Army*, 4 MSPB 285 (1980); *Calvin J. Hill* v. *U.S. Postal Service*, 4 MSPB 44 (1980); *Serafin T. Isip* v. *Dept. of the Navy*, 4 MSPB 457 (1980); *Lyle R. Jarze* v. *Dept. of the Air Force*, 4 MSPB 247 (1980); *James M. Larson* v. *U.S. Postal Service*, 4 MSPB 14 (1980); *James L. Laursen* v. *Veterans Administration*, 4 MSPB 155 (1980); *James K. Lockwood* v. *Dept. of Health and Human Services*, 4 MSPB 471 (1980); *Robert B. MacDonald* v. *Dept. of the Navy*, 4 MSPB 459 (1980); *Thomas F. Mahurin* v. *Dept. of the Air Force*, 4 MSPB 372 (1980); *Aaron Mascarenas* v. *U.S. Postal Service*, 4 MSPB 507 (1980); *Thomas A. McDonough* v. *U.S. Postal Service*, 4 MSPB 441 (1980); *Larry T. Miller* v. *Dept. of the Navy*, 4 MSPB 353 (1980); *Maria A. Penaloza* v. *Dept. of Health and Human Services*, 4 MSPB 389 (1980); *James E. Pierce* v. *U.S. Postal Service*, 4 MSPB 52 (1980); *Cecilio Polido* v. *Dept. of the Air Force*, 4 MSPB 236 (1980); *Frank A. Portlock* v. *Veterans Administration*, 4 MSPB 376 (1980); *Virginia E. Rhinehart* v. *Dept. of Health, Education, & Welfare*, 4 MSPB 190 (1980); *Edmund T. Sample* v. *Dept. of the Navy*, 4 MSPB 334 (1980); *Olive K. Shane* v. *Dept. of the Army*, 4 MSPB 243 (1980); *Hope Sibert* v. *Dept. of Health, Education, & Welfare*, 4 MSPB 132 (1980); *Joseph L. Simmins* v. *Dept. of the Navy*, 4 MSPB 413 (1980); *Armond D. Smith* v. *Defense Logistics Agency*, 4 MSPB 477 (1980); *Walter Smith* v. *Dept. of the Army*, 4 MSPB 73 (1980); *Harold B. Tate* v. *Dept. of the Interior*, 4 MSPB 192 (1980); *John J. Warner* v. *Dept. of the Navy*, 4 MSPB 425 (1980); *David P. Weinberger* v. *U.S. Postal Service*, 4 MSPB 395 (1980); *Michael Wheeler* v. *Dept. of the Navy*, 4 MSPB 225 (1980); *James Williams, Sr.* v. *Dept. of the Army*, 4 MSPB 479 (1980).

1.111 Involuntary Resignation or Retirement

Jerry F. Bass v. *Dept. of the Navy*, 4 MSPB 199 (1980); *Jerry L. Cahill* v. *Dept. of Agriculture*, 4 MSPB 26 (1980); *Suzanne Foeckler* v. *Veterans Administration*, 4 MSPB 246 (1980); *Helene T. Morrow* v. *Dept. of the Army*, 4 MSPB 494 (1980).

1.120 Suspension For More Than 14 Days

Rosalie M. Gilligan v. *Dept. of Housing and Urban Development*, 4 MSPB 312 (1980); *Theodore W. Hayes* v. *Tennessee Valley Authority*, 4 MSPB 466 (1980); *Simmie E. Hensley* v. *Dept. of the Army*, 4 MSPB 285 (1980); *Arthur W. Martinez* v. *Dept. of Defense*, 4 MSPB 109 (1980); *Rose Mary Mitchell* v. *Dept. of Agriculture*, 4 MSPB 232 (1980).

1.130 Reduction in Grade

Maynard D. Alsup v. *Dept. of the Air Force*, 4 MSPB 150 (1980); *Martin Bennett* v. *Consumer Product Safety Commission*, 4 MSPB 135 (1980); *Eolis Billingsley* v. *U.S. Postal Service*, 4 MSPB 428 (1980); *Samuel L. Brown* v. *Civil Aeronautics Board*, 4 MSPB 25 (1980); *Anthony J. Caporale* v. *National Aeronautics and Space Administration*, 4 MSPB 244 (1980); *Buford Dunn* v. *Dept. of the Army*, 4 MSPB 463 (1980); *Sidney E. Harman, Jr.* v. *Dept. of the Navy*, 4 MSPB 48 (1980); *Joseph H. Kanner* v. *Dept. of the Army*, 4 MSPB 215 (1980); *Charles P. Lomartere* v. *Dept. of Defense*, 4 MSPB 123 (1980); *Sharon A. Martin* v. *Dept. of the Army*, 4 MSPB 181 (1980); *Helene T. Morrow* v. *Dept. of the Army*, 4 MSPB 494 (1980); *William E. Norwood* v. *Tennessee Valley Authority*, 4 MSPB 223 (1980); *Ramon R. Sanchez* v. *Dept. of Justice*, 4 MSPB 238 (1980); *Wallace Thomas* v. *Dept. of the Army*, 4 MSPB 336 (1980); *Rosa White* v. *Dept. of the Treasury*, 4 MSPB 11 (1980).

1.140 Reduction in Pay

Barbara A. Allen v. *Dept. of Housing and Urban Development*, 4 MSPB 338 (1980); *Salvatore J. Grasso* v. *Internal Revenue Service*, 4 MSPB 205 (1980); *Youline Hale*, et al. v. *Dept. of the Air Force*, 4 MSPB 177 (1980); *Sidney E. Harman, Jr.* v. *Dept. of the Navy*, 4 MSPB 48 (1980).

1.150 Furlough of 30 days or less

Crawford E. Mosely v. *Dept. of the Navy*, 4 MSPB 220 (1980).

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.210 Suspension For Less Than 14 Days

Edwardo R. Gonzales v. *U.S. Postal Service*, 4 MSPB 88 (1980); *Salvatore J. Grasso* v. *Internal Revenue Service*, 4 MSPB 205 (1980).

1.220 Letter of Reprimand

1.230 Actions Based on Unacceptable Performance

1.231 Denial of Within Grade Step Increase

James Battaglia v. *Dept. of Health and Human Services*, 4 MSPB 169 (1980); *William C. Ensminger* v. *Dept. of the Army*, 4 MSPB 367 (1980); *Robert C. Hug* v. *Dept. of the Army*, 4 MSPB 209 (1980); *William E. Parker* v. *Defense Logistics Agency*, 4 MSPB 188 (1980); *Robert L. Reames* v. *Dept.*

of Agriculture, 4 MSPB 203 (1980); *Thomas W. Wells* v. *Dept. of Health, Education, & Welfare*, 4 MSPB 39 (1980).

1.232 Reduction in Grade

James E. Bradley v. *Consumer Product Safety Commission*, 4 MSPB 345 (1980); *Bette L. Connors* v. *Dept. of the Army*, 4 MSPB 475 (1980).

1.233 Removal

Richard Gonzalez v. *Dept. of Justice*, 4 MSPB 28 (1980); *Charles Malizia* v. *Dept. of the Navy*, 4 MSPB 33 (1980); *Maria A. Penaloza* v. *Dept. of Health and Human Services*, 4 MSPB 389 (1980).

1.240 Reduction in Force

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1.311 Absence Without Leave

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1.312 Abuse of Leave

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1.313 Tardiness

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1.321 On-Duty Conduct

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1.322 Off-Duty Conduct

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1.330 Criminal Conduct

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1.331 On-Duty Conduct

1.3311 Criminal Charges

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1.3312 Criminal Conviction

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1.3612 Prohibited Discrimination

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1.3631 Refusal to Accept Reassignment

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1.364 Gross Waste

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1.370 Charges Related to Off-Duty Conduct

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3.111 Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a

3.120 Race, Color, and National Origin Discrimination

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3.121 Civil Rights Act of 1964, 42 U.S.C. 2000e-16

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3.130 Handicap Discrimination

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3.131 **Handicapping Condition**

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3.1311 **Physical Disability**
3.1312 **Mental Disability**
3.1313 **Alcoholism and Drug Abuse**

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3.132 **Rehabilitation Act of 1973, 29 U.S.C. 791**
3.1321 **Reasonable Accommodation**
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3.140 Sex Discrimination

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3.141 Civil Rights Act of 1964, 42 U.S.C. 2000e-16

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3.142 Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)

3.143 Sexual Preference

3.144 Sexual Harassment

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3.151 Civil Rights Act of 1964, 42 U.S.C. 2000e-16

3.160 Marital Status Discrimination

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4.210 Preponderance of the Evidence

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4.310 Agency Procedures

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10.121 Duties and Powers

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10.1211 Discretion

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10.12111 Dismissals

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10.12122 Interlocutory Appeals

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10.1213 Orders of Presiding Officials

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10.12145 Recommended Decision

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10.131 Board Reopening

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10.1322 Criteria

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14.510 Statutory Authorization

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14.520 Interest of Justice

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17.410 Psychiatric Exam

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17.420 Physical Exam

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ALPHABETICAL LIST OF WORDS AND PHRASES

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ABANDONMENT OF POSITION: *See* 1.310 (Adverse Actions, Substantive Charges, Attendance Related).

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AGE DISCRIMINATION: *See* 3.110 (Discrimination, Prohibited); 7.3245 (Labor-Management Relations, Labor Organization Unfair Labor Practices, Discrimination); 11.131 (Prohibited Personnel Practices, Discrimination).

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3.111 (Discrimination, Age). *See also* Age Discrimination.

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ANNUAL LEAVE: *See* 1.312 (Adverse Actions, Substantive Charges, Abuse of Leave).

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§§ 5361 through 5364—Grade and Pay Retention: *See* 12.110.

§ 5366—Appeals: *See* 12.420.

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§§ 5401 through 5405—Merit Pay and Cash Awards: *See* 8.600.

CHAPTER 55—PAY ADMINISTRATION

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Subchapter IX—Severance Pay and Back Pay

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§ 7202—Marital status: *See* 3.160; 7.3248; 11.136.

§ 7203—Handicapping condition: *See* 3.130; 7.3249; 11.133.

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§ 7313—Civil disorders: *See* 17.120.

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§ 7512—Actions covered; *See* 1.100; 1.200.

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Subchapter V—Senior Executive Service

§ 7542—Actions covered: *See* 4.210; 6.123; 8.531.

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§ 7701(a)—*See* 6.120; 10.111; 10.400.

§ 7701(b)—*See* 6.120; 10.100; 10.120; 10.130; 10.300; 10.400.

§ 7701(c)—*See* 11.000000; 4.200; 4.300; 9.330.

§ 7701(d)—*See* 6.410; 10.115.

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§ 7701(f)—*See* 10.114.

§ 7701(g)—*See* 14.500.

§ 7701(h)—*See* 7.1131; 7.1141; 7.1151.

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§ 7703—Judicial review of decisions of Merit Systems Protection Board: *See* 7.1143; 7.1153; 10.150; 10.2115; 10.2126; 10.2135; 10.227.

CHAPTER 83—RETIREMENT

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§§ 8312 through 8320—Forfeiture of Annuities and Retired Pay: *See* 15.2012.

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§ 8332—Creditable service: *See* 15.120.

§ 8333—Eligibility for annuity: *See* 15.201.

§ 8334—Deductions, contributions, and deposits: *See* 15.201.

§ 8335—Mandatory separation: *See* 15.140.

§ 8336—Immediate retirement: *See* 15.100.

§ 8337—Disability retirement: *See* 15.130.

§ 8338—Deferred retirement: *See* 15.201.

§§ 8339 through 8345—Annuities: *See* 15.201.

§ 8346—Exemption from legal process; recovery of payments: *See* 15.202.

TITLE 29—UNITED STATES CODE
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§ 206(d)—Minimum wage (sex discrimination): *See* 3.140; 7.3244; 11.134.

§ 631—Prohibition of Age Discrimination: *See* 3.110; 7.3245; 11.131.

§ 633(a)—Prohibition of Age Discrimination: *See* 3.110; 7.3245; 11.131; 3.130; 3.320; 7.3249; 11.133.

§ 791—Employment of handicapped individuals: *See* 3.140; 7.3244; 11.134.

TITLE 42—UNITED STATES CODE
THE PUBLIC HEALTH AND WELFARE

§§ 2000e-16c—Equal Employment Opportunities: *See* 3.120; 3.150; 7.3241; 7.3242; 7.3243; 11.132; 11.135.

ERRATA

(Volumes 1 and 2)

Volume 1

Page No.	*Correction*
xii	Fourth caption from top of page: volume-page citation in parentheses should read "(1:159, 196)"
123	5th full paragraph, first line: "persons" should read "person"
124	5th line from top of page: "thorugh" should read "through"
126	1st full paragraph, 16th line: "satutory" should read "statutory"
127	1st full paragraph, 2nd line: Insert comma between "other" and "so"
152	3rd full paragraph, line 2: "repondents" should be "respondents"
154	Footnote, line 7: "dsciplinary" should be "disciplinary"
160	2nd full paragraph, 4th line: Capitalize "Marshals"
162	1st full paragraph, penultimate line: "appeal" should read "appear"
165	3rd full paragraph, 3rd line: Delete comma appearing between "that" and "other deputies"
171	Footnote 20: Insert after last sentence "[cont'd]"
174	3rd full paragraph, 2nd line: "incuded" should read "included"
177	16th line from top of page: Citation should read "(D. C. Cir. 1977)"
181	1st full paragraph, 9th line: Insert "the" between "that" and "four deputies"
216	2nd full paragraph, 8th line: Delete period, insert comma after phrase "On the contrary"

Page No.	*Correction*
216	3rd full paragraph, 1st line: "OPM" should read "OPM's"
225	1st full paragraph, 6th line: "etablishment" should read "establishment"
226	1st full paragraph, 13th line: Delete duplicate comma after "systems,"
227	1st full paragraph, 2nd line: "procesures" should read "procedures"
228	2nd full paragraph, 7th line: Insert single space and quotation marks before ". . . employees"
229	Footnote 71, penultimate line: Delete duplicate comma after "§ 2302,"
230	Footnote 75: Delete duplicate parenthesis before "(Senate Report)"
230	Footnote 78, 2nd line: "systems" should read "system"
230	Footnote 79, 3rd line: "operation defects" should read "operational defects"
231	3rd full paragraph, 3rd line: Insert "the" between "related to" and "job"
231	3rd full paragraph, 6th line: "systems" should read "system"
231	Footnote 80, 5th line: "suggestions" should read "suggestion"
234	1st full paragraph, 1st line: Insert "w" to read "The Mathias amendment was adopted,"
234	2nd full paragraph, 4th line: Insert apostrophe to read "Board's"
234	2nd full paragraph, 8th line: Change period after "Group" to comma
235	4th full paragraph, 6th line: Insert "s" to read "both sections the term"
235	4th full paragraph, 10th line: Insert comma to read "However,"
237	3rd full paragraph, 3rd line: "proposed order from" should read "proposed order for"
269	1st full paragraph, 2nd quoted paragraph, 2nd line: "rules" should read "ruled"
306	2nd full paragraph, 2nd line: Capitalize "Management"
307	1st full paragraph, 3rd line: Insert comma after section cite to read "2101.3(a)(8)),"
429	2nd full paragraph, 1st line: "Boards" should read "Board's"
497	Footnote 10, 1st line: Should read "See pages 491-492, supra."
501	3rd full paragraph, 9th line: Insert comma after section cite to read "§ 4301(3),"

Page No.	*Correction*
508	1st full paragraph, 9th line: Insert comma after "evidence"
536	2nd paragraph, line 10: "appellant" should read "appellate"
	Volume 2
xi	11th Caption from top of page: Should be listed in bold type; Insert volume and page number in parentheses after date of decision to read "(2:20)"
96	2nd full paragraph, 1st line: "We being" should read "We begin"
96	3rd full paragraph, 10th line: "not file" should read "not filed"
97	1st full paragraph, 20th line: "intial" should read "initial"
98	1st full paragraph, 5th line: Capitalize beginning of sentence to read "However,"
103	4th full paragraph, 2nd line: "is" should read "in"
103	4th full paragraph, 4th line: "render" should read "renders"
189	1st full paragraph, last line: Delete duplication of phrase "basis of the appeal."
189	3rd full paragraph, 6th line: "apellate" should read "appellate"
228	1st full paragraph, 10th line: "refered" should read "referred"; also, Insert "the" to read "submitted with the petition"
259	1st full paragraph, last line: Delete duplicate word "requests."
263	1st full paragraph, 7th line: "his" should read "is"
264	3rd full paragraph, 6th line: Insert period after "rationality"; begin new sentence with "As explained"
267	1st full paragraph, 3rd line: "base" should read "bare"
267	2nd full paragraph, 2nd line: "were" should read "was"
268	3rd line from top of page: begin new paragraph with "Integral to"
268	4th line from top of page: "discrimintation" should read "discrimination"
294	3rd full paragraph, 5th line: "inference" should read "interference"

Page No.	*Correction*
298	4th full paragraph, 5th line: "jurisdictions" should read "jurisdiction"
335	1st full paragraph, penultimate line: "agancy's" should read "agency's"
335	Footnote 1, 2nd line: "his" should read "him"
336	1st full paragraph, 3rd line: "industrial-commerical" should read "industrial-commercial"
336	2nd full paragraph, 1st line: "petitioner's" should read "petitioners'"
364	2nd full paragraph, 6th line: Delete comma after "position" and insert "to duplicate hers, transferring her duties to that new position,"
366	1st full paragraph, last line: Insert period after "§ 351.201(a)"
366	Footnote 6, 3rd line: "on" should read "in"
435	Footnote, 3rd line: Delete comma appearing between "remand" and "the appeal"
492	3rd full paragraph, 1st line: "had" should read "has"
492	3rd full paragraph, 4th line: "absences" should read "absence"
572	2nd full paragraph, 3rd line: "empowerd" should read "empowered"
587	1st full paragraph, penultimate line: Delete "MSPB Docket No. AT075299048"
607	Last paragraph, penultimate line: "arugments" should read "arguments"
608	3rd full paragraph, 2nd line: "Neverhteless" should read "Nevertheless"
611	1st full paragraph, last line: Should read "¶ 8875 at 6618 (D.D.C. 1979)."
612	2nd line from top of page: "services is" should read "services in"
620	2nd full paragraph, 1st line: "interim" should read "initial"
622	3rd full paragraph, 10th line: "case" should read "cases"
624	Footnote 5, 8th line: Insert after "fee" the following: "award. Agencies and their representatives should therefore be"

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